L. Church

Index.

Ejectment

Waste

If an infant executor de son tort makes a contract respecting the assets which by law he cannot make he is not bound by it after taking administration 2 B & C 33

Dof. before taking adm.n sanctioned an expensive funeral which a relation had undertaken for the deceased. Held that after taking adm.n was liable in that capacity for this expense 32 L. J. 349.

Executors and Administrators

Lev 174 1 Com 238 Yelv 33 2 Brust. 268 Yelv 83. 125 Sal. 302. Carth 154 Hence a grant of letters testamentary is unnecessary 2 Ro Abr 144 pl. 6 Mod 92. Pl. 62 2 Ro Ab 668

Before probate he may distrain or avow for rent when a reversion of a term for years comes to him from testator & the rent accrues after testator's death - for the rent accrues after the reversion is vested in him - semb if the rent accrued in testators life - Sal. 302 Lev. 174 1 Vent 370 1 Ro Ab 919 2 Ba 413, 1 Com 238.

So before probate he may maintain debt on a rule of testator's goods by himself - for here it is his own contract. 1 Com 238 Lev. 174 Cont. 46. 52 -

But in respect to actions of debt & other action on contracts of testator &c (ut supra) it is not true as is said according 5 Co 28 Dr 39 in that the Exr cannot before probate bring an action in these cases. It is clearly argued that he cannot maintain the action or declare before probate but his suit may lie after probate - It is suff. if he procure letters testamentary at the time of declaring, when he must make proof - these remove the impediment ab initio. 2 Ba 413 1 Ro Ab 919 1 Com 238 Skinn. 23 3 Lev 58 1 Vent 370 Bacy 481 Cont. 371 Sal 302 -

Co-executors

If there are several Exors they are deemed in law but a one person representing the testator - their interest is joint entire indivisible 2 Ba 396 1 Com 240 Lev 134 -

Yet it is held that the act of one is the act of all - hence the profits of one is the profits of all - & a release or a gift of the effects by one is valid

being regarded as the act of all – so also a release of debt by one is binding. 2 Bac 305 Lod/21 Levint 318 1 Com. 240 Went. 95 God/134 1 Roll. 924 Dy. 23 Cro E 347.

So if one grants all his interest in the testators land for years to a stranger the whole passes – or if one release his part of a debt due to testator the whole is released – this is diff. from the case of joint tenants – for each Est. is supposed of the whole – there are no part or moieties in their prop. 2 Bac 305 Dy. 23 God/134 Lod/21.

So one cannot grant his interest in the testator, exept to his Coex. for nothing passes by the grant each being supposed of the whole as before. 2 Bac 305 – God/135 – 4.

Neither can one have an action of Account against the other 1 Com 89 240 1 Roll 117 Dy. 23 God/135 –

But Ext. have a right to plead diff. pleas (God/135 contra) have a covenant of Litig. to compel judg. against all is bad & the judg. will be set aside on motion. 1 Com 240 Bac 20 1 Roll 929 2 Bac 307 St. 4 Ann. Ch. 6.

But one of two Ext. cannot make a valid release or convey an interest so as to bind the other but both must join (1 Com 240 1 Leth 450 Lod. 21) for their authority is entire & joint – tho this rule was formerly doubted (God/134 in Salw 741 in notis 2 Ven 314 2 Ve. 267) so this there is an exception in case of the profs declaring in their own prop. here they are considered as principals – & not as representatives & one may release the right of action 1 Leth 1162 –

If one of two Ext. sue the power survives to the other & so in case

Comm. 2 Bac 416 1 Com 240 1 Day 3 Atk 509 2 Vern 314 Bal 36

It is said that one Ex. may compel his Co-ex. to account with him in Chan. for a moiety of the effects. 2 Ba 396 Ro. 33 Qu

If the Ex. one made residuary legatee one may sue the other in the Spiritual Court for a moiety - for he is in the character of a legatee. God 135 Vent 99 2 Ba 296.

God. says that one Ex. is not chargable for the wrong of his Co-ex. & is no farther liable than for the effects which come to his hands. 2 Ba 395 God. 134 Vent 109 Cro E 318.

Yet if all the Ex. join in giving a receipt for money actually received by one only all are liable at law to creditors, as if they had all received - Secus in Eq. where the actual receiver only is liable - for receiving is the act, & giving the receipt mere matter of form. 2 Ba 396 Bal 318

All the Ex. are regularly liable to suit & be sued - for they are considered as one person in law. 2 Ba 396 God 134 Vent 95 4 Mod 255 Bal 307 Ro 37

If execution is bought against one Ex. a plea that another is Co-ex. without avowing that he has administered is ill - for if the Co-ex. has not administered Pl. is not bound to know that he is Ex. 2 Ba 396 1 Lev 164 1 Sid. 242

But if one Ex. sues alone it is suffn. for Deft. to plead that there is another Ex. without avowing that he has administered - for the Court is not supposed to be within his cognizance. 2 Ba 366. 381.

Executors and Administrators

In actions by Exors. all must join in the action the one has not proved the will or is within age or has refused before the Ordinary. 9 Co 37 1 Saund 291 Yelv 130 Lent 95 Sal 3 Pr. Ch 26

If an action be brot against one of several Exors & he does not plead the mistake in abatement he loses the advantage of it. 2 Ba 396 Carth 21 Argen

If one of two Exors sue alone it is pleadable in abatement only. 1 Saund 291, Yelv 130

If in case of two Exors one refuse to accept or prosecute yet he must be named & there must be summon & severance. the effect of which is to take away his priority to the suit. Sal 307 9 Co 37. Cod. 134 2 Ba 396 2 Roll 198 Lent 95 114 1 Ent 109 Cro E 652 Mutt. 128.

But if trespass is committed on testators goods while in posn of one of several Exors he alone may sue for it - for here he need not sue as Exor but on his own posn (Cod. 134 2 Ba 397 Lent. 104) gen - lessee sues for the posn of one is the posn 3 Leon 200 2 Ba 397. 1 Litt. 462.

Executor de son tort

An Exor. de son tort is a person who without any authority from the deceased or Ordinary does such acts as belong to an Exor or Admor. 2 Ba 387 2 Vs 507 Lent 151 Cod 90 1 Ban 254 Sal 51. 2 S. 299

In gen. any unlawful intermeddling with the goods of the deceased will make a stranger Exor de son tort - d. paying

If one appointed adm^r in another state bring the effects from that state into this or collect effects here without taking adm^n here he is liable to be sued here as Exr^r. the same test & judgt will be rendered de bonis testatoris or de bonis propriis as cirst recovered expenses, Brown 60 –

Payments made by ex^r de son tort pending a suit for an account of the intestate's estate to one who took out adm^n after the institution of the suit & was therefore made a co deft will not be allow. 10. C. E. 6. 1. 2 Pr. 97. 3 do 587 2 Burn. Adm. 309

debts with the effects &c - & the value of the effects taken is immaterial - even nilling (Salm. 79 (Dy. 156.) is suffn. 2 Bl 507 5 Co 33 Went. 171. 2 Ba 387 1 Roll 918 Hob 49 Cy 105-57 2 Ld 100

So paying legacies out of the effects - taking a specific legacy without Exn amount - or by pleading when sued as Exor any other plea than ne unques, Exor - for by any other plea he admits himself Exor - So the widow of the deceased leaves Exx are not by taking more of goods than is convenient for her degree - Or if one stranger takes frgm of the goods & delivers them to another the latter is Exor de son tort. 2 Ba 387 Godb 91 Went 174 1 Roll 918 1 Com 264 Cy 166 2 Ld 97

By St. 43. Eliz. if goods of intestates are given by fraud to a third person or a release given by fraud of a debt the donee or releasee is Exor de son tort. 2 Ba 387 1 Com. 265 Co 2 40 b 810

If one intermeddles with the effects even in pursuance of direction from the deceased he is an Exor de son tort 2 Ld 97

So a fraudulent gift by the deceased will make the donee an Exor de son tort as to creditors from the nullity of the same but not as to next of kin - legatees &c - for the gift is good as to them (2 Ba 605 1 Roll 549 Godb 197 Co 2 71 2 Ld 597)

In this case if in any perhaps one may learn Exor de son tort in Ex. 1 Rcd - 104 contra post 881 129. 12 b vid 1 Ld R 25

But one may do many acts relating to the effects of the deceased with assent of creditors - repairing the buildings, paying

suffering for want of repair - providing necessaries for children
So taking the effects under a claim of property unless the
claim is merely colourable - an artifice - for here he does
not undertake to act as Exr. &c. 1 Roll 104 1 Com 264 Cy 166
2 Ba 388 Cobl. 94 2 Bl 507 Saul. 37

Intermeddling with real estate does not make one an Exr.
de son tort in Ct. 1 Roll 104

What acts are suff.t to make an Exr. de son tort is a question
of Law 2 Hk 99. Selw 798 in n. 17

Rule. If the act of the Stranger is such as fairly warrants
the inference that he claims the managmt. & disposal
of the effects he is an Exr. de son tort - otherwise not. In
the first case the act is such as belongs to the office
of Exr. &c 2 Ba 388 Mod 126 Cy 166

The above rules respecting acts which are Exr. de son tort
apply in their full extent only to cases where there is no
rightful Exr. or Adm.r. & to those where there was none at
the time of intermeddling - for after probate of the will
or after the Exr. has otherwise administered - or after Administr.
granted common acts of intermeddling as taking poss.n &c
will not make an Exr. de son tort - for there is a rightful
Exr. &c - & the goods taken after probate and effects in the hands
of the rightful Exr. &c. they having come to his hands - yet the
wrongdoer is liable as a trespasser to the Exr. &c. 2 Ba 388. 413
1 Co 33 Sal. 302. 7. 13 Saund. 289 380

But even if after probate one not only intermeddles but claims

to be Ex^r as he is chargeable as Ex^r de son tort (2 Bac 388 5 Co 34 B.N.B 44) & it seems from Bac. 313 that this claim may be inferred from certain acts so as be subject him - such as receiving & paying debts &c - the not from common acts of intermeddling - As such as are in the nature of communis error

If the intermeddling is before probate or (in case of intestacy) before Administr^n granted the stranger intermeddling is an Ex^r de son tort tho the act be nothing more than the taking prop^y & he is liable as such to creditors unless he deliver over the goods he to the rightful Ex^r before action brot. 2 Bac 388 5 Co 33 Bac 313 297 1 Roll 918 Cro E 565 Hob 119

An Ex^r de son tort is liable to creditors on the ground that from his act they have come to presume that he is a legal representative & he has no right to disprove this presumption when his own wrongful act has raised it 2 Ld Raym 99 2 Ld 507 12 Mod 471

An Ex^r de son tort is liable to all the trouble of an Ex^r without any of his profits - he is liable to be sued as Ex^r but cannot sue as such - He cannot retain for a debt due to himself as other Ex^rs may even against creditors of an inferior degree. 2 Ld 507 2 Lev 378 Stra 1106 5 Co 30 Mod 527 Roll 922 Cro E 630 12 Mod 441-71 1 Com 266 Yelv^n 137 2 Mod 51 2 Lev 43.

But if he pays debts with his own money he may retain to the amount so paid 1 Com 266 1 Lev 76

So if after intermeddling he obtains letters of Administr^n

he may retain for his own debt as against creditors of an equal & inferior degree, for the letters of Administn purge the wrong except he is still liable to be sued by the name of Exr de son tort he having after Administn granted, the privileges of a rightful Admr 1 Com 266 Stra 1106 2 Vent 180 Str. 337 1 Roll 923 Carth 104.

The rule is apparently contrary where an Exr de son tort after taking letters of Administn may be charged as Exr - for he shall not discharge himself by any thing ex post facto - but this it seems means nothing more than that even after Administn obtained he may be described in a suit against him as Exr - & that he cannot for being thus described abate the writ - for as the act purges the wrong is purged. 2 Ba 391 Cro E 102 365. 553. 810 3 Com 198

An Exr de son tort is liable as far as he has assets to the rightful Exr - as to all creditors of the deceased & legatees 1 Com 266 Vent 257 Carth 104 5 Co 30 Hob 49 1 Roll 919 2 Ba 391 Lord. 51.

When sued by the Exr he is described not as Exr but as a stranger - by a common trespasser. 2 Ba 388 Carth 103 Lev 295 1 Vent 249 1 Com 266 Str. 384 2 Ba 379

But if an Exr or Admr is a creditor to the deceased he may bring debt against the Exr de son tort with an averment that none of the assets come to his hands. 2 Ba 379 1 Roll 940 Str. 389

In actions by creditors he is named Exr generally. 2 Ba 400 5 Co 31 Yelv 137 Willes 208 1 Com 266 Vent 254 5 Com 201

Generally he is liable only to the extent of assets received & has against creditors he is allowed all payments made to creditors in equal or superior degree - He may plead plene administravit & give such payments in evidence to support the issue - but as against the rightful Ex^r he cannot by pleading such payments bar the action hence nil debet is ill - yet on the gen. issue he shall receive credit allowed such payments in mitigation of damages unless perhaps the rightful Ex^r is by such payments prevented from retaining for his own debt. 2 B & Al 507 8 Mod 527. 12 Co 441 4 Co 30 Went. 180 Co. Litt 104 Shep 274 2 B & C 390 1 Ventr 349 2 Ld Raym 1225 These lawful acts bind the property disposed of against the rightful Ex^r &c

The an Ex^r de son tort is generally chargeable only to the amount of assets received yet if he plead ne unques Ex^r to an actionably creditors he is liable for the whole demand 1 Com Dig Went. 257 2 B & C 390 Noy 119 Cro E 472

It is said however that in those cases where the value of the assets is very trifling the Ex^r de son tort may be relieved in Eq. 2 B & C 390 2 Dess. 147.

If he plead in this case plene administravit he shall not be charged beyond the assets received. 1 Com Dig 166 Dy. 166

If there be a rightful Ex^r & an Ex^r de son tort they may be sued jointly or severally - Semble in case of a rightful Admr. for an Ex^r & Admr cannot be joined in action 1 Com Dig Went 255.

Executors and Administrators

At C.L. the Exr. or an Exr. de son tort was not liable to creditors tho they were in Eq. - Now by 30 Car 2 the Exr. or an Exr. de son tort are liable at law to creditors.
2 Ba 391 Lev 51 4 Bam E.L. 191 1 Com 266 2 Mod 293

An Exr. de son tort is mentioned in an St. (164 Bit. Estate) "If any person he shall alienate embezzle &c" Yet it seems doubtful whether in common cases such a character can exist in Ct. as the proceedings against him would tend to defeat the average law in case of insolvency - Suppose the estate solvent - this cannot be known beforehand - After the Exr. is precluded from representing the estate insolvent there is not this objection - than perhaps such a character may exist here as to creditors whose claims have been duly exhibited - As where the time of exhibiting claims has expired the estate not having been represented insolvent - qu. whether this can be before the expiration of eighteen months from the notice even as to creditors within the State (St. 168) for the time may be prolonged by probate - qu. whether till the expiration of two years as to creditors out of the State. St. 169

In one instance perhaps there may be originally an Exr. de son tort in Ct. - in case of a gift by the deceased to defraud creditors - ex necessitate rei - His rightful Exr. cannot recover it being bound by the gift. 1 Rol 549 2 Ch. 197 Cro J 271 2 Ld Ra 597 2 Ba 605. Cro E 676 1 Rod 104 qu. 2 Ub. 711. 129

Making debtors Executors

By the old Eng. law if a debtor was made Exr. his debt was discharged - But now the devolution of such Exr. is assets for payment of debts & legacies - the reason assigned for the old law was

Sair there can be no ex^t de son tort in Ct. where the estate is insolvent 1 Ct. R. 25 ibid 13 Ct 215

that the Exr could not sue himself - but this reason might be applied with equal propriety to Admrs & they were never allow to retain against creditors. 2 Ba 379 1 Bos. 630 Prov. 438 Salk. Ca 240 Prov. 179 5 Co 30 13b Hob 10

The Exr as such is residuary legatee unless there is something in the will clearly manifesting the testator's intention that he should not be - R. M. K. supposes that the right of one Exr to withhold payment of his debt against those who claim under the St distributions is founded on this idea that he is entitled to a residuum 1 Ro 1192 Yelt. 160 Co 2 373 Sal 305 -

There has been no decision recognizing this principle but a clear proof that it is the true one is that the debt of an Admr who is never entitled to a residuum is not discharged by the appointmt - qu whether if the Exr has such a legacy as would bar his right to residuum can he retain his debt against such document -

Making Creditors Executors

A debtor may make his creditor his Exr & in such case the Exr may retain so much of the testator's assets as will satisfy his debt - i.e. where the debt is in equal degree with those creditors against whom he retains for if he be a creditor of an inferior degree he can not retain against one of a superior degree. 2 Ba 378 Sal 300 Rowd 185 Mutt 128 Went 31 Godf. 115 Mod 40 2 Bl

So if Administn be granted to a creditor he may retain for his own debt against other creditors of equal or inferior degree Godf. 115 Went 31 -

Executors and Administrators

These rules are reasonable & just - for a creditor who first brings an action gain a priority to all others in equal degree & as the Ex. cannot bring his action against himself he must unless allowed to retain his debt be postponed to all others tho in equal degree.

But an Ex. de son tort (Cute 578) who is a creditor cannot retain - for this would be allowing him to take advantage of his own wrong 5 Co 30 2 Ba 379

An Ex. is not allowed to take in part when there are not assets enough to pay the whole debt. - 2 Lith. 411.

Executor's right to the Surplus

to have after debts & legacies paid the Ex. shall have the surplus to himself & not be trustee for next of kin. 2 Ba 423 Vent 4 2 Vs 514 Peck. p 525

The principle on which they take is that they stand in the testator's place & have the legacy to it they could claim it like a thing found - this was at C.L. but Chancery have adopted this rule, that if they can collect from the will itself that testator did not intend his Ex. should have the surplus then the Ex. shall have the surplus & hold it as trustee to distribute according to the St. Distributions. Ex is placed on the same footing as an Admor. - But if no such intention of the testator can be collected from the will the Ex. will be considered as residuary legatee. 3 Lith 226 300 2 Ath 47 1 Vern. 473 Pr. Ch 81 323 Salk. Ca 240 Bro. C 179 3 Pd 43 194 Ropar 320 Stra 559 2 Vs 514 2 Ba 423.

In Eng. an Ex. has no wages for his trouble, but in Ct & most of the U.S. they are paid for their trouble – It would seem then on principle that they have no more claim to the residuum than Admrs. – In Ct. they are never considered as residuary legatees

A legacy bars the Ex. right in those cases only where it affords proof of testator's intention that that Ex. should not take the the residuum. (Roper 230 2 Bl 514 Ch. w.) & parol proof is admissible to shew that notwithstanding the legacy the testator intended the Ex. should have the residue. but not vice versa. 2 Ves. Jr. 465 4 B 2 Bl 515 Ch. w.

It is laid down by legal writers that in cases of this nature parol proof is admissible to relut an equity – i.e. to establish the old legal import of the bill or other instrument when such import varies from the equitable construction. Pow C. 427 2 Cith. 68 220 3 Pb 40 2 Ves 91 1 Wil 343 1 Wern 473 1 Bro C 201. 328

Yet such proof cannot be admitted to establish the equitable against the legal construction – but the former must be collated from the instrument itself. Babb. 240

In one case a man gave most of his estate to his remote relations & one shilling each to his near relations – Here L.K. thinks the Ex. ought to have had the residuum but the Court ordered distribution to the nearest relations.

If testator give the residuum to a person who dies in his lifetime by which the legacy is lapsed the Ex. shall not take it – for the testator has expressed his intention not to give it to the Ex. & it is probable now that the same

Real & personal estate given to widow for life rem.d to A. & a devise of property that a stranger & the widow would superintend & take care of the education of A. so as to fit him for a profession Held that the widows life interest was charged with such maintenance & education of A. a trust being created for that purpose by these words 8 C. E. Ch. 449, Ham 706

ment to be held of every lapsed legacy & intestat. 3 Bro 28 2 Bl 515 Chw

Wills

A will is a declaration of the testator's mind either by word only writing in disposing of an estate & to take effect after testators death. Carth 38 Lord 1.2 5 Bro 497

In every bill in Eng. there must be an Ex.r - A testamentary instrument not appointing an Ex.r is called a testament. 2 Bl 503 Pow D. 23 (7 Rb 146 arg. contra) ante 208 685.

Generally every person labouring under no particular disability has a right to dispose of the whole of his personal property by will - & in all cases the presumption is that he was of suff. discretion & ability so that the onus probandi lies on those who would contest the will. Lord. 140 2 Ills 318 1 Ins 89 Pr. Ch. or Bro. Ch 314

Idiots lunatics madmen & persons deprived of reason by old age or otherwise are incapable of making wills. but as respect to the degree of capacity requisite in these cases no gen. definite rule can be given - the Court generally rely upon the opinion of witnesses whether the testator was compos or not - If the testator was incapable thro ignorance or other causes to read the will it must have been read to him & such reading must be proved

Generally deaf & dumb persons cannot make wills - tho proof may be admitted to shew that such persons knew the content, & had understanding suff. to make a judicious disposition. Lord 138 148 142 -

A will made under restraint or fear is invalid & it would seem that the cause of fear whether real or imaginary ought to be regarded. So unreasonable importunity will vacate a will if it appear that the testator being sick so made it against his judgt. - but if he recover & suffer the will to stand for years it will be good - but the case of restraint stands upon a diffnt. footing from duress in other matters

The age of discretion for making wills in Eng seems to be 14 in males & 12 in females - this appears to be the C & rule - but I. K. suppose it to be at 17 - for according to Dr Kaudrche the Civil Law which governs in this respect places it at 17 - In Ct. the age in both sexes is 17. H. Ct 23.

Formerly doubted whether an alien could make a will - now settled that he can - An alien enemy cannot make a testament of lands or goods

A Husband cannot dispose of his wife's choses in action chattels real & paraphernalia by will - i.e. of the kind - tho he may by deed

One cannot by will dispose of property holden in joint tenancy in Eng - for the jus accrescendi prevents - Secus in Ct - jus accrescendi not acknowledged.

In case of fraud by false representations a will generally will be set aside

Persons guilty of treason & felony cannot make wills of personal property - for it is forfeited - but this rule cannot

A testator may by a will duly executed charge his real estate with payment of all legacies which will include pecuniary legacies given by an unattested codicil but he cannot by a will duly executed power to charge a power to charge his real estate or the produce of it with legacies given by an unattested codicil 8 G. & Ch. 220

12 Ves, 3 Ross v Cunyngham

Legacy to A. & in case of his death to another means his death in the life of testator & if A. survives testator he takes absolutely 8. C. E. Ch. R. 283. 2 Atk. 1261 Newbery v Simmons 4 Ves 160. Cassidaya v Ross 8 do 12. But this rule will not prevail if it appears from the will that death was not testators intention 8 E. Ch. R. 283.
Vid to the same effect 8. C. E. Ch 436 in which all the cases are ~~[illegible]~~ reviewed

To the time to which words of survivorship connexion tenants in common of a legacy shall be taken relate whether to testators death to the distribution of the fund or to some other time refers to the testators death unless some other time is formed except the period of distribution Sinden v Suffolk 1 P Wms 96 Mann. 700. 670 8 C. E. Ch 437 overruling Douglas v Chalmers 2 Ves 501 Mann. 745

operate where the crime occasions no forfeiture.

In case of several wills the last in date is in law the will - but a republication of a former will makes it good against a latter one - for it speaks from the time of republication -

In case of several devises if there is a revoking clause in the first, latter, devise the former one thus revoked cannot be set up by republication - Semble where the revoking clause is in the latter devise -

If there are two contradictory clauses in a will the last will stand.

A remainder of a chattel interest may by way of Executory devise be limited over after an estate for life provided the remainder man be alive at the time of the death of the first devisee & that the contingency on which the remainder is to rest happens within a life or lives & 21. years & the fraction of a year afterwards. 2 B & A 4 2 Bro. C.C. 33. 12 Ves. 20

In Yates vs Smith. C.P. explodes this kind of executory devises the decision did not indeed abolish the Eng. law for there was no actual limitation over - the property was bequeathed for life without more but the opinion of the Judges was that such a limitation of personal property ought not to be permitted in Ct.

The limits of executory devises of real & personal property are the same. Fearne. 320 2 B & A 4 Chuts -

If a life estate is created in personal property with remainder over the legatee for life is compellable to make an inventory of the property & lodge it in Chancery - he is also compellable to give bonds for the careful use of the property. 3 P.Wms 334, 2 Bro C.C. 399

An estate tail cannot be created in personal property - So that if personal property in Eng. is given to a man & the heirs of his body the absolute ownership vests in the first taker - The reason assigned for the rule is that an estate tail in personal property cannot be barred by fine or recovery & therefore if suffered to exist it must create a perpetuity.

But by a ~~stat.~~ the immediate grant of the first donee in tail takes an absolute fee simple in real property thus given the reason for the rule in Eng. that the vesting and absolute property in the first taker seems not to apply here - since by giving the same effect to the words "heirs of his body" in the case of gifts of personal as in those of real property no perpetuity is created -

Wills must be in writing signed & published by the testator - qu. Is signing indispensable? 2 Bl 501, Com Dig 452

It is not necessary that there be subscribing witnesses as in a devise of real property & the testators name written by himself in any part of the instrument will be a suff. signing (2 Bl 501) Lord Eldon says that if testators name is written by a stranger & afterwards approved by testator it is a suff signing -

If testator cannot write his mark with his name written by another is suff.

to S. C. Ch. C. 348 the distinction taken in construing the words of a deed according to their strict technical meaning & those of a will according to their ordinary import is lamented & it would seem to have been the opinion of the court as gathered from the whole case that the terms of every instrument should receive a construction in conformity with its ordinary import taken together that was a limitation by deed of settlement & it was holden that the term "Executors & administrators" which are technically words of limitation 4 C. Ch. C 586. 3 Ch 485 15 Ves 532 Williams & Dawson) needed an interest for the next of kin.

Duty of Executors and Administrators

Gen. rule - If a will both of real & personal property be well executed as to the personal property only it is good only as to the real - for it is said the testator's intentions ought not to be unnecessarily defeated & as his intention is good in part his intention should so far prevail. But S.K. thinks one part of the will is executed with an eye to the other. Suppose a man to give all his real estate to his youngest son & all his personal to the eldest - If the above rule were true the youngest would have not a farthing of the estate - S.K. says reject the whole will or none of it.

Nuncupative Wills

A Nuncupative will is a disposition of a man's personal chattels in his last sickness by parol. They were frequent at C.L. & might be made of personal property to any amount. But the restrictions imposed upon them by 29. Car 2. have almost abolished them. see 2 Bl. 500

No instance of a Nuncupative will in Ct. & as we have no St. on this subject it is doubtful how far they might be allowed or whether they would be allowed at all.

Duty of Executors and Administrators

The power & duty of Exr & Admr are nearly the same tho there are some points in which they differ. 2 Bl 507 1 Com 237

As to the obligation of Admr to pay debts & make distributions see 2 Bl 507. 515 1 Ch. R 274 489 2 Bac 413.

The first business of an Exr is to make an inventory of all the estate which can be assets in his hands & to procure the appraisal of it by judicious persons under oath. 2 Bl. 510 -

690 Duty of Executors and Administrators

After this the Exr. or Adm. must account with the Court of Probate for the property inventoried tho he is not liable at all events for the amount of the appraisal.

If the estate is sold for less than the appraisal the Exr is not liable for the loss unless it was occasioned by his own fraud or negligence (2 Bac 430 3 R 280) If the loss should happen thro his fraud or neglect he is liable on his bond to an action by creditors - but if creditors sue in common form for their debts they must grand their action on the inventory

If the estate should be sold for more than the appraised value the Exr gains nothing but must account with the Court of Probate for the avails of the sale. 3 R 281

A Judge of Probate ought not to reject an inventory of property the title to which is disputed - for his decision cannot affect the right of trying the title at C.L. Rich 160

The Exr is never liable as Exr till assets received by him unless he has made unreasonable delay or refused assets come to his hands his liability commences. Shepl. 472 Cook 45

If Admr to submit to arbitrement & the arbitrators award against him the payment of a certain sum he cannot afterwards plead the want of assets as to that claim. 3 R 453. 5 Dt. 1 501. 6 b. 69.

An Inventory Computa set by one Exr to be as much of money due from the testator he does not make such Exr personally liable. 1 R 102 Ex 108 618 1 R 691

An ex^r who has poss^n of notes or against debtors in another state if sunny is bound to collect them there as the personal estate must be distributed according to the law of the state where the testator was domiciled at the time of his death 3 Paige 182 1 Bligg. E.R 93 239 –

An ex^r who gives no order for the funeral of his testator is liable only for such as were suitable to the rank & circumstances of testator tho he was present at the funeral sur for those if they were ordered by another & credit given to such person 2 H & L 407.

An atty or guardian is entitled to all proper expenses to which he has been subjected in the course of the estate & may employ agents 1 Ch. Ca 28 but for his own services he is entitled to the allowance fixed by Court only 2 Paige 288

While he acts bona fide under a decree of the Court he is entitled to payment of his services & expenses altho such decree be afterwards reversed 8 Ct 263.

Paymt. of debts

Exrs. & Admrs. are bound for their testators or intestates debts to the extent of their assets only. 2 Ba 305 Godt. 134 Went. 100 Bro. C. 318

Payment of debts

Exrs. are bound to observe a certain order in the paymt. of debts 1 Com. 243 2 Bl 511) which in Eng. is 1. Funeral charges - expenses of proving the will & the like - 2. Debts due to the King - of Record or specialty - 3 Debts preferred to all others by particular st. as forfeitures, &c. 4. Debts of record 5 Specialty debts - 6 Debts on simple contract. 3 P.Wms 402. 1 401 Salk. C 247 2 Vern. 324 2 Bl 511 2 Ba 432 1 Ves 590 Doug 438.

Of debts in equal degree the Exr. may pay which he pleases first but he cannot prefer a debitum in praesenti solvendum in futuro to those which are already payable - Seems if the latter are of an inferior degree. 2 Ba 434 Bro. C. 315 3 Lev. 57.

So if he pays debts of an inferior degree while there are debts due of a superior degree yet he is answerable if he did not know of the latter. 2 Ba. 435 Mod 184 2 Vern. 37. 88 Eq. C 235 1 Ves 590 Raved. 279 1 Ves. 230 2 Show 493

A Creditor may obtain priority to those in equal degree by using legal diligence (2 Atk. 413) i.e. of those in equal degree he who first obtains judgt. is entitled to full paymt. even to the exclusion of the rest by the Eng. law. 3 P.Wms 401 Salk. C 247 4 Bro. C 287

A voluntary bond is postponed to all debts but preferred to legacies 1 Atk 292. Sal 66. ? If a creditor objects to the paymt. of a bond given by the deceased on the ground that it was voluntary the Exr. may by bill bring the parties into Chancy. at their own expence to litigate their claims & make paymt. according to the decree given.

Executors and Administrators.

Paym^t of debts

Enquiry may always be made into the consideration of a bond when third persons are interested

Commissions on the estates of deceased persons in Ct. appear to be empowered to enquire into the consideration of bonds when such enquiry is necessary. But this if voluntary it ought not to be indulged in the average in case of an insolvent estate neither ought it to be rejected for such objection would never bar the obligee from making any claim whereas in many cases by circumstances appear he may become entitled to payment.

It is the duty of the Ex^or to retain assets for the payment of debts in præsenti solvendum in futuro & if the Ex^or having them retained become a bankrupt before payment it is doubtful whether the creditor can pursue the assets into the hands of legatees & devisees - it seems however reasonable that the creditor should pursue the assets in this as in common cases. It has been thought in Ct. that in these cases the creditor ought by bill in Chan^ry to call in all the legatees & devisees that his demand may be charged upon them in proportion to their respective shares.

In exhibiting claims against the estate of a deceased person but which cannot be ascertained within the time limited by law for the exhibition of claims is not foreclosed but may be recovered of the Ex^or if he has assets. Kirby 86. Hva. 143 & Pilo 262 -

No time is limited by the Eng. Law for the exhibition of claims against the estate of a person deceased.

In Ct. funeral expenses - those of last sickness - debts due to the public & expenses of administr^n must be first paid - between other debts no distinction

A Bare act of sale by an ofr is an indemnity to the purchaser if there be no collusion 1. Atk 468. 3 do 235 14 Ves 352. Neither is the purchaser bound to look to the application of the purchase money 7 John Ch 21. 4 Sch 625 n 632. 642. 649 7 J. C. C 157.

Taking the assets in payment of the private debt of ex^r who be paid 7 J. C. C. 157. gives eid.

Paym^t of debts

Execution lies in favor of a Collector of taxes against an Ex^r to sewer rates due from the deceased. Kirby 393.

No person in Ct. having neglected to exhibit his claim within the time limited can afterwards recover unless he discovers some new property of the deceased not entered in the inventory - In such case the Supr. C. have rendered judg^t. accordg. to the average paid to other creditors but this was reversed by the C. E. Kirby 391.

It seems indeed that the Supr. C. have no authority to give judg^t. for an average sum in those cases - this limes belongs to the C. of Probate. Mr. R. supposes the H. does not contemplate any merit in the person making the discovery of new estate - but that as new property is discovered it must be inventoried by the Ex^r & that a new average may be made & that the new Creditor if his claim be allowed by the Commissioners appointed to examine it is after receiving the average before paid to the other Creditors to take an average share with the remainder - tho a Creditor whose claim was presented within the time limited & rejected cannot present his claim again so as to share the new average.

If the Ex^r refuse to inventory the newly discovered property knowingly to be the Intestates he is liable on his bond - but if he has a doubt with regard to the ownership it would seem reasonable that the Creditor claiming should indemnify him in making the inventory - Might not the Creditor in this case on the Ex^r. refusal to inventory (he having settled the whole estate before discovered) take out Administr^n de bonis non?

A Creditor to an Intestate lost his action on the discovery of new property immediately against the Admr. without applying to him to inventory

Paym^t of debts

- go thro with the probate proceedings - the Counsel for Deft contended that a suit thus lost is sustained would defeat the average law - the C.K. adjudged the action not sustainable - the Supr. C. affirmed the judgt. but sent if the judgt. below had been diff. they would have affirmed it - the St. not having pointed out the mode of proceeding. 1 Mass 241.

If the Exr. has paid out the whole estate observing the priority of claim et supra & is then sued he may plead plene administravit. - So Ex. an Exr. or Admr. cannot plead plene administravit against a creditor except in cases where the assets are merely suff. for paymt. of funeral charges &c - Kirby 246.

In cases of insolvency where the estate is suff. to discharge part of the debt besides funeral charges &c if a creditor sues for more than his average the Exr. &c must produce the proceedings of probate in his defence - but if the estate is exhausted by creditors plene administravit may be plead against legatees -

No interest arises on an average struck non insolvent estate so as to charge the estate but the Admr. may subject himself personally to the paymt. of interest. Kirby 38

In Ch. on testator's death & after inventory made thereof as well as personal estate is of specious - then the Ct. of Probate limit a time for the exhibition of claims against the estate -

The personal property is sold by an order from probate & afterwards the real if necessary under a power from Probate - after such sales the debts are paid

In voluntary settlm^ts & intestation by the representatives without

Hegan Executor 15 Serg.t & Rawle 64 that if an exr. an
buy in the debts of the testator at a discount the
estate shall have the benefit of the speculation &
not the exr. an

amounts of Probate is no bar to the claim of creditors. Rid. 428.

An Ex^r may always represent the estate insolvent if he chooses

When the amount of debts, compared with the value is uncertain the Ex^r may procure the appointment of Commissioners from the C. of Probate to examine claims exhibited against the estate & to accept or reject them - The decision of these Commissioners is absolutely binding against the Creditor but not against the Ex^r except when a claim of his own has been rejected - tho the estate proves solvent. 1 Root 103.

If they reject claims the claimant has no other remedy than to pray the C. of Probate to appoint other Commissioners to ~~examine~~ examine the determination of the former - If the Court grants the request the case is released & finally determined But if the Court refuse to appoint new Commissioners the decision of the first is final - While this examination is pending in Probate all suits against the Ex^r are suspended

An Appeal from the decision of Commissioners is not allowed in C^t. in favor of Creditors against an Ex^r or Adm^r except where a claim has been allowed in favor of an Ex^r or Adm^r - for in this case the Ex^r or Adm^r being the person whose claim has been disapproved cannot himself bring an appeal - Appeals against creditors have always been allowed. Rev. 97 1 Root 96 103.

If an estate be represented insolvent persons interested have far as the proceedings of Commissioners operates? Rid. 258

Decided by C. of E. May 1790 that an appeal lies to the Supr. C. from

Legacies.

the C. of Probate if the latter accepts a return of Commissioners not made according to law & this appeal as well in favour of Creditors as Exs. Williams 13—

This Appeal however is not from the Commissioners as a Court. the objection to the Appeal was, that Probate was obliged to accept the return & therefore the return was not a proceeding of the C. of Probate

On appeals from Probate to Supr. Ct. it is the province of the latter to settle principles of Law & not to proceed in the settlent. of the estate as a Prerogative Court. Kirby 285.

The St. limiting appeals from Probate runs against feme Covert. Kirby 247

Whatever vests in the Ex. as a private individual & which would not vest in him as Ex. are equitable opts. - whatever vests in him as Ex. are legal opts. 2 Vern. 764 Lod. 59.

Legacies.

After payment of debt, the next duty of Ex. he is to pay the legacies. 3 Ba 466 2 Bl 512

A Legacy is defined to be a gift or bequest of particular goods or chattels by testament. 3 Ba 466 Godl. 271 2 Bl 512 3 Atk. 285.

An Ex. to whom a legacy is given may not prefer himself as in case of debt. 1 Vern. 434. 2 Bl.

A devise of lands differs from a legacy in this - the first vests immediately on the death of the same as if they were sold to

A Specific Legacy is a disposition of a certain thing so that it may be distinguished from any other thing of the same kind

Ulty. If after the thing is bestowed in pledge by a creditor of the testator the executor must pay the debt from other assets.—

devise - but a legacy goes to Exr. who is a trustee of it - on testator's death the inchoate right of legatee commences tho the legal property of the legacy remains in Exr. & he may dispose of even a specific legacy in payment of debts. Ambt. 111. 2 Ch. Ca. 508 Su. 427. 435 Roper 190

The assent of Exr. to a specific legacy whether a real or personal chattel vests the legal property in the legatee & any slight matter may amount to an assent & thereon lies for the recovery of it at C. L. 2 Eq. C. 165 - 3 East 120 4 Co 28 Hau. 79 2 Dev. 209 2 Sw. 209

So an action at C. L. lies for a pecuniary legacy upon a promise by Exr. in consideration of assets - Semble if no assent & promise Cowp 248 5 B & P 90 -

The thing itself makes the legacy specific it should be clear certain & exactly defined - Pecuniary legacies are liable to creditors before specific - Roper 25 Co 2 467 Bro. C. 60

Specific legacies are also liable to creditors if the other assets be insufficient - But if a part only of the specific legacies be taken for the payment of debts the legatees whose parts are not taken are compellable in Chancery to make a reasonable allowance to those whose legacies have been taken. (Roper 113 Kirby 284.) This rule obtains however only when it is necessary to take part of the specific legacies - for if the Exr. takes any legacy of this kind when he has a sufficiency of assets he shall be liable for the amount so taken -

If a specific legacy is lost or destroyed by any unavoidable accident the legatee to whom it was given must bear the loss. Bro. C. 81. Rep. 24

Executors and Administrators

After the payment of specific legacies if there be not assets suff. to pay all the pecuniary ones there must be an average. Rep. 111 P.W. 222 4 Ves

If there be not enough to pay specific legatees those who are first paid are always preferred & there shall be no average between them.

There are cases where pecuniary legacies are preferred to specific - but this preference depends upon the testator's intention. Ps. Ch. 303 Rep. 113 -

If the whole of a personal estate at a particular place is bequeathed in specific legacies & afterwards a pecuniary legacy is given to be paid out of the personal estate disposed of the specific legacies are chargeable with it - for there is no other personal property from which it can be raised. Ps. Ch. 392.

Where testator said that Ps should be first paid at all events before the other pecuniary legatees & assets fell short of paying the whole Ps. must abate with the others, notwithstanding - one pecuniary legatee is not to be preferred. 1 Dem. 81.

Vested and Lapsed Legacies.

A vested legacy is one which vests of course in the legatee or his representatives. A lapsed legacy is one which cannot be taken by legatee but sinks into the residuum - If a legatee dies before the testator the legacy is lapsed. 1 P.W. 700 2 Eq. C. 290 4 B.C. 501 3d vid. 548

If there is a residuary legatee he is entitled to the lapsed legacies - but if there is none they go according to the H. Distributions - Exception - Provided in Eng & Ct. that if the legacy lapses by the

If testator limit his residuary property to one for life with remainder over it is prima facie to be intended that he means the property shall pass to him in remainder & if any of it be of a wasting nature it must be immediately sold & converted into permanent property unless it appear from the whole will that testator had not that intention 8 Co. & Ch. Co 186. 188 7 Ves 137 Howe v Earl of Dartmouth

Quere in 1 Pridg 34 that bequeath Pr. on real estate & payable at a future day lapse if legatee die before the day - Quere where payable out of the personalty or where the estate is given to a stranger on condn that he pay such legacy - or if time of payment is postponed for the benefit of the estate & not with regard to circumstances relating to legatee

Does it lapse for the benefit of a stranger? 1 Pridg 84

death of the legatee living the testator it goes to the next of kin not to the residuary legatee - If it lapses by failure of a consideration on which it was given it goes to the Residuary legatee 2 Dem 394 207 378 521 915 Pr. Ch 200 470 Lad. 246

A legacy may be given with a proviso that if legatee die before testator or before he arrive at a certain age it shall go to another & such limitation is good. Pr. Ch 470 2 Dem. 207 Ill 521 -

A legacy given to be payable at a future day is a vested legacy & does not lapse if he die before the day - Semble if given to be when he arrives at a certain age & he never arrives at that age - This distinction was adopted by the Eccl. Court in the time of Schoolmen without reason & sanctioned by Chancy because the disliked to differ from them - It is thought whenever in the Ch & these principles have not been adopted by decisions we should adhere to reason & place the two last legatees on the same footing. 2 Vent. 342 2 Ind. 415 Cutto 52 Burr. 227 1 Vern. 456. 52 Ed 207 521 378 673 Pr. Ch 21 Stra 800 905 915 3 Bro. C 4th. 8. 3 D R 41 3 Co. 19 1 Eq. C 195

If interest is made payable on a legacy of the latter kind it is considered as vested - So also where the legacy is to be paid out of a certain sum which yields an annual income it is vested - 2 Vern. 673 1 462 2 Bro. C 3. 315. 5 Pr. Ch 317. 1 Ch 512. 3 Ch 45 2 Eq. 263

If such legacies (as both kinds respect) are charged on real property & legatees die before the time at which they are payable in one sense & given in the other they shall lapse for the benefit of the heir who is a favorite of the Eng Law 2 Pr Ch 610 246

Executors and Administrators

Chancy. will compel the heir to pay a legacy charged on his land yet if such legacy lapses or if it be vested & the legatee dies before the day of payment the heir will take it to the exclusion of the residuary legatee & of those who claim under the st. distribution & the same favor is shown to devisees whose devises are charged with legacies. 1 Atk. 552 22 2 P.C. 276.

The person who is entitled to a lapsed legacy may demand payment immediately after the death of the first legatee provided (Semb.) a year & day have elapsed & no time is fixed by testator. 2 Vern. 31 283 -

Conditional Legacies

Gen. rule in grants that if the condition is incident the grantee is cannot take till the cond. be performed - Sem in case of bills - for if the cond. is precedent & illegal it need not be performed but the legacy will vest - If the legacy is given on cond. of not disputing the bill & the legatee commences a suit whereby the validity of the bill is put in question this no forfeiture if there was probabilis causa litigandi Rep. 42 2 Dem. 96 1 Dent 201

Legacies to which are annexed gen. conditions in restraint of marriage vest absolutely & the conditions are void 1 Mod 85 Sod. 150 1 Vern 28 1 Ventr. 210. 52 Cunn 266 3 Bal 179 Hra 284

Restrictions as to any particular day or description of said to be said (Cone of Religion vest contra 1 Vern 21

A legacy by a husband having children by his wife to his

Where payment of legacies is a condition of the devise if the legatee or his heirs refuse to accept the devise the estate descends to devisees heirs chargeable in equity with the payment of the legacies - So the estate is chargeable in equity if the devisee accept - 1 Paige 34 -

wife on condn. of her not marrying - condn. good for husband is supposed to have in mind the education of his children the sub. condn. by a stranger would not have been good 3 Ba 479 1 Dem. 20 2 Mod 86 Godf. 45.

Condns. restrictive of marriage before a reasonable age have been holden good - So to marry or not to marry at a particular place if reasonable. Semi of unreasonable 1 Pl. 285 Swinb. 267 1 Vent. 249 1 Dem 20

Legacies given on condn. of being forfeited if the legatee marries without the consent of a particular person are not subject to forfeiture upon breach of condn. unless limited over to another person upon that breach - qu. does not this apply to condns. subsequent? 1 Vent. 199 1 Atk 502 Pr. Ch 565 1 Vent 249 3 Ba 480

Legacies well given.

A last will being usually made when the testator is presumed inops consilii the Law regards his intention rather than the legal import of words used to signify that intention & hence any words which manifest an intention to create a legacy are good. Godf. 281 2 Dem. 467.

It has been adjudged that Grand children may take under the description of children if testator had no child the they are not considered as children in any other case 2 Ve. 206 2 Dem. 106.

If a man bequeath legacies to all his children & Grand children it extends only to those who are in esse at the time the

Executors and Administrators

Legacies well given

Will is made. Cf 177 1 Inst 112 Pr Ch 470

Property given to be equally distributed among testator's relations or poorest relations to shall be divided according to St. Distributions - for the description is too good to have any efficacy - Pr Ch 411 Salk. 251 2 Ves 527 (2 Ves 381 con. not law)

Where property is given to a number of children to be distributed according to the direction of a particular person named in the Will the decision made by that person will stand unless manifestly unjust. 2 Ves. 421. 513 -

By a gift in a Will of all the testator's personal property all that he possessed at the time of his death will pass. Gifts of Real property for that only will pass that the testator owned at the time of making the Devise. Sal 237 Swinb 418 2 Ves 638.

A bequest of all or residue personal property in Q extends to all he may afterwards have in it - 2 Ves 688 2 Ves Jr. 638

By a bequest of a particular thing at B - the thing passes whether it was at B at the time of testator's death or not -

Testator gave Q £100 & then said out "out of the £100 I gave Q I give B £50" Decided that where words of diminution massed they take away the whole from the first legatee - qu. as such the testator's intention?

When a legacy shall be a satisfaction of a debt or duty

Rule peremptory that where a man gave a legacy to a creditor

A devise of all "the property in & about my dwelling house" & certain title deeds are found in it. The trust declared in them does not pass to bonds of mortgagee, promissory notes. 10 C. & Cl. 259 Ind Hemings v Brooks 1 Dow. 73 Pothams v Sutton 15 Ves. 389 Popham v Lady Aylesbury 1 Ambl. 68.

By marriage articles wife was to receive $3000. three months after husbd. death. husbd. died living the wife having made his will but his property by reason of subsequt. event was divided in conformity to the St. distribution. held that the distributive share of the wife & amounting to $3000. was a satisfaction of the husbd. covenant in the marriage articles. 1 Swanst 211. not a performance of the covt.

A benefit under a will held to be a performance or satisfaction in 2 Ves Jr. 356 3 do 530 4 Bro P.C. 12 4 Ves. 391. 10 Ves Jr. 15 do 507. Contra exception to the genl. rule 1 Ves 520 2 do 409 2 Ves Jr. 463 9 do 413 12 Mass 391 2 Mun. 413 3 Sandf. 54 4 Des. Eq. 614

Legacies well given

it should be in satisfaction of the debt if it was equal or superior to the debt - otherwise not (2 P. Wms 616 132 1 Ves. 521 124 P. Ch 236. 394 3 P. Wms 227 533 2 Eth. 300.) But now this rule is entirely abolished. 3 Eth 96. 196 2 Ves 409 2 Vern 177

1. That the legacy to operate as an extinguishment of the debt should be ejusdem generis with the debt - 2. Payable at the same time or as soon - 3. That there be no claims existing upon person for payment of just debts - 4. That the rule does not apply against an illegitimate child - 5th That testators intention to extinguish the debt by the legacy be apparent 6th That it be expressly given in payment 1 P. Wms 410 2d 555 - 3d 226 - 4th 616. 1 Ch 425 389 129 295. 2 Ind. 155 Rep. 163 Ro 47.

If several legacies given to the same person are exactly the same in quantity & in the same instrument they are not cumulative - otherwise they are - as if the same legacy is in a will & Codicil unless there be some circumstance shewing a contrary intention. 1 P. Wms 423 2 Atk 161 213 1 Bro C 389. 2d 526 2 Eth 636 Suid. 526. R. 300 ✠ -

A legacy to the wife or other person entitled to money from testator by marriage settlement is generally considered as intended to be in satisfaction of a part or the whole of what is due & the legatee may have her election which she will take P. Ch 138. 263 2 Vern 555 39 115 235 329 1st 95 1 P. Wms 324 1 Bro C 305 3 Ves Jr 53

A gift to legatee by testator during his life is to be considered as a part of the legacy bequeathed by the will made previously to the gift P. Ch 263 1 [illegible] 1 Vern 95 2d 115

Executors and Administrators

Ademption of Legacies

This is the taking away a legacy before bequeathed. Swinb. 522 3 Bac 470.) it is never to be presumed.

The accidental destruction of a legacy or alienation of it by the testator may be an ademptn. or not according to the circumstances & to determine this point the intention must be sought & if it cannot be accounted for but upon supposition that testator intended to adeem the legacy it is an ademption. 2 Ch. 205 2 Bro C 108 2 Dev. 631

But if the legacy is lost or such a disposition made of it as to preclude such intention of the testator it is no ademptn. As if testator pledges or sells it from necessity - no ademptn. Swinb. 522. 524 Rob 39

A destruction or loss of a thing is not necessarily an ademptn. tho it be specific - for it may be replaced by a similar article 3 Bac 470

If a debt is bequeathed & testator calls it in for other dishonorable purposes than to take it away from legatee it is an ademptn. 2 Vent 681. 1 Ves 25. 35 1 Eq. C 302) Semble if the payment be mandated by testator or if the debtor be in failing circumstances or testator be in want of money - here the Ex. is answerable for the value of it. 2 Vent. 681 Mod 373 1 Bary 35 2 Ch 328 164 Cruch 401 2 Dev Eq. 309. 39 Vent. 228

So in some cases where the legacy is destroyed, or where a house bequeathed is burnt down or rebuilt by testator there is no ademptn. Swinb. 523 2 Dev 625 - Rob 36 Forrest 226.

If one bequeaths his daughter £300 & afterwards on her marriage gives her the same or a greater sum the legacy is extinguished -

Said down as a rule to be rebutted by shewing a diff.t intention that if the legacy be of goods specified to be in a particular place they must be there at his decease in order to give effect to the legacy (Rop 87 Bro C 129 on 4.th 38.) But the removal of the goods out of a Ship before testator's death is no adeptn. Rop 39 Ves. 2.d 3 -

Making & refunding legacies

The Ex.r is not obliged to pay any legacy till the legatee give security to refund if any debts afterwards appear - for no time is limited by the Eng. law for the exhibition of claims against the estate of a person deceased. 2 Ves 358 2 Dem. 205 Coop 287.

If a legatee on receiving his legacy does not give security to refund (et supra) he is not afterwards compellable to do it - gen 1 Dem 94.460 2.d 205 Ch. Ca 116 Coop 285

This rule however does not operate if the Ex.r when he paid the legacy was ignorant of the existence of debts which afterwards appear, or if he was compellable in Chan.ry to pay them. 2 Dem 360 2 Ves. 103 Rop 210.19 3 Ba 183 Coop 287

Creditor may come upon the assets of his debtor in the hands of the legatee by a bill in Chan.ry if Ex.r is insolvent - otherwise not. 2 Ves 103

Not settled in Ch. whether if an Ex.r has ignorantly paid a legacy & debts afterwards appear he should be permitted to pass the assets in the hands of legatee - It seems reasonable that he

should have this privilege tho in Eng^d he has not – Mr. R. supposes that even in Eng^d an action for money had & received might lie since the money in these cases is paid by mistake & the consideration fails. Doug. 285

Pecuniary legatees shall abate in proportion to the deficiency of apets. Vern. 81 Bro. C. 467. – So a legacy given to an Ex^r for his care & trouble must abate with the others. 2 Vern 434.

So one legatee may compel a pecuniary legatee to refund where the apets become deficient tho there was no provision for refunding & tho he has still a remedy against the Ex^r & may compel him to pay it out his own pocket if he abundantly paid away the apets to the other legatees. Ch. Ca 134 248 2 Dick. 360 Rep. 117

Payment of Legacies

1st. An Ex^r should be careful in the payment of legacies to take a per in receipt or have sufficient vouchers – for it is holden to be such an equitable demand as is not barred by the St. Limitation the after a length of time a legacy may be presumed to have been paid yet this presumption is not a ground of limitation – Pr. Ch. 228, Vern 255 2 Ca. 484 1 Ver 571. Rep. 101.

2. They ought to be careful into whose hands they pay legacies – for without a decree of Chancery they cannot pay them over to fathers or other relations of Infants Ch. C 240.

If a legacy is paid by an Ex^r to the father of an Infant legatee the Ex^r pays it at his own risk – Tho if paid to any other guardian for every other guardian gives security to discharge the trust faithfully. Pr. 285 5 Co 18 20 Pr. 18 Gilb. 105 3 Bu 485 1 Eq. C 300.

Paym.t of legacies.

A legacy given to a feme covert must be paid to her husband (2 Vern. 261 Rep. 96.) for where the feme lived separate from her husband & the legacy was paid to her & her receipt taken it was decided on a bill brot by husband that the legacy should be paid over with interest. So where husband & wife were divorced a mensa & it has been adjudged that the husband alone can release a legacy left the wife tho this rule does not apply where the property is given to the sole & separate use of the wife. Bro 2 908 3 B & A 485. Moor 665 12 Mod 891 2 Vern 659.

3. If testator appoint no time for paym.t of legacies they are made payable at the end of a year from testator's death - this rule is copied from the Civil Law. (Rep. 95 Cod 272 2 Atk 415 2 Bro. C. C. 99. 1 Ch. Ca 95. 2 Ch. 88.)

A legacy (vested & end) is payable to the representatives of deceased legatee at the time originally fixed for paym.t 2 Vern 21 199 283.

4. If a legacy is demanded at the expiration of a year it carries interest from that time - & in case of minors it carries interest after a year without demand. 2 Atk 415 3 B & A 485 Pr. Ch 161 Rep 68 Ves. 310 Vern. 251 62 2 Ath. 109 2 Pr. 106. 26 2 Ves Jr. 267.

Interest is payable on legacies in Ch. the same as in Eng.

A demand is necessary - for the Ex. who is a trustee is not like a debtor bound to search the legatee out - suff.t if he secures the property in his hand when demanded. Rep. 104

If testator appoints a legacy to be paid at a time certain it has been doubted whether it shall bear interest from

Where Legacies alone are charged on real estate the purchaser is bound to see to the application of the purchase money. Seems where both debts & legacies are so charged the debts may be paid first the personalty, 10 C.E. Gb 325 7 de G 73 Williamson v Curtis 3 Bro. C.C. 69 Jenkins v Giles 6 Ves 654 n

Genl. Rule. That Legacies do not in general bear interest till default in payment. - if of an indefinite one a year after testators death - if payable at a future day thence from that day 1 Swans 561 n 3 Atk 101 4 Br. C. C 149 n 1 Cox 133. 3 Ves 10 4 do 1. But a Legacy to an infant child or by one in loco parentis if there be no other provision for its maintenance bears interest from testators death BW 783 3 do 21 1 Eq. C. 301 1 Ves. Sen 308 3 Ves 10 3 Swans. 689. - it makes no difference whether it be vested or contingent 3 Atk 430 Dick. 310 11 Ves 1. 3 do & B. 183 3 Rep 263 - Legacy to a child in ventre does not bear interest till its birth whether will direct that it shall from testators death 2 Cox 425 - Where the rate of interest or maintenance is specified in the will Legatee cannot in general claim more. 3 Atk 716 3 Ves 283 286 n 1 Cox 433 The exception in favor of testators children does not extend to adults 18 Ves 301 1 Swans 553 nor to a wife 12 Ves 461 nor to a natural child or grand child 2 Atk 330 3 do 58 1 Schf & Lef 1. nor to a nephew or niece 3 Ves 10. 10 C. E Ch 386 n

No action will lie for taking & detaining personal property of the Ptf or heir at law before it has been distributed to him by a regular administration 1 Day 150

the time so fixed or from the time demanded. - What difference ought there to be whether the Dem or the will fixes the time is the Eqt. in this case obliged to look up the legatees? 2 Sal 415 Pr. Ch. 11 Ves 3 Ba 487 qu. Ro. 70 3 Lith 697 2 Ves 110 2 Ves Sr. 10.

By the C.L. money made payable at a certain day bears interest from the time fixed for paymt. - If a legacy is made payable to a child of testator even at a future time & no other provision is made for its maintenance it will bear interest from testator's death (or it is said from the end of a year) Ro. 70 1 Ves 310 3 Lith. 101 Pr. 329 1 Eq. C 391 2 Vent. 346

The assent of Eqt. is necessary to vest a legacy. What amounts to assent? "I give you any" does not the one contended. There must be something clearly evidential of consent. Plowd 526 2 Vent 358 88 8 Co 39.

Legacies how recoverable.

In Eng. generally by suit in Ecclesiastical Courts only Bill in Chancy. - If the legacy be charged on land the latter method only is allowed. Py. 644 Ekay 23 H Bla 145 Sal 415 5 Ves 690 3 Ba 488 Co Ro 284 89 91 1 Ves Jr 108. 7 Ves 567 8 Ves 505 3 Bart 120 Ch Ca 205 1 Bla 245 279 Ed 697

In Ct. a suit is lost in the C.L. Courts for this purpose - the action is a special one stating all the facts. - tho the legatee may then in Ct. or Eng. can recover his legacy title after a year and day

Chancy. compels the paymt. of legacies on the ground of a trust tho of personal property. Palm. 120 Ca Lag 364 2 Shep 50

Residuary Legacies.

In Ct. If legacies are charged upon land given to devisee the devise is liable to legatees in Eq. of [redacted] C.S.

Where suit is brot in the Ecclesiastical or Chancy Courts it must be for the legacy itself & not on the promise - tho if Ex^tr should promise to pay he may be liable in C.S. Courts - & the promise to pay a legacy must have been on consideration & by H. Ex. in writing 1 Ried 46. 8 Ib 23.

Residuary Legacies

A Residuary legatee is one appointed by testator to take the residuum after payment of debts & particular legacies - hence if the debts & legacies are paid & discharged such residuary legatee if any be appointed by the will will take the surplus to the exclusion of all others except in cases where legacies charged on real estate are lapsed or do lapse for the heir's benefit. 2 Pd 276 Cutts 552 2 Bl.

If a Residuary legatee die before the debts are satisfied so that it does not appear to have made the surplus will amount yet the Ex^tr of such legatee shall have the whole residue of the personal estate which remained at his death - Coutts 52 -

If the Ex^tr omit part of the assets out of the inventory or undervalue those put in the Residuary legatee may file a Bill of discovery against him before he has paid testator's debts. 3 Ker 484 Pot Rep. 409.

If no Residuary legatee be appointed under the will & testator's intention be manifest that Ex^tr should not take

Obligee of a Bond gave it to A. afterward in his last illness 5 days before his death signed a memorandum purporting to be an absolute assignment of the Bond to A. held not to be a donatio mortis as it did not appear when or under what circumstances the Bond first came into A's possn & the assignment was immediate & uncontested & Equity will not assist the donee A. to recover the amount of it if the gift was without consideration 10 C. E. Ch 79.

the residue then it is distributed as the testator died intestate. 1 Salk 33. 1 Dens 473 2 Ld 737 1 P.Wms 550 3 40

Donatio causa mortis

This is a specific present made by a person in contemplation of death - It is always conditional - for if donor recovers the donee is not entitled to the property. ~~of the donation~~ Seems if donor dies - for the property of the donation vests immediately in donee without the intervention of Exr or any other person 2 Salk 269 1 P.Wms 411. 41 -

There must be a manual delivery of the thing given or some act amounting to it by donor -

A gift of this kind is not good against creditors tho no action lies against Exr in this case he not being entrusted with the property - S.12, supposes the Creditor who claims against the donee must bring his action against the Testator or Exr as on tort - for the representatives of the deceased being bound by the gift the Exr do cannot as in other cases invalidate the property & sue the donee to recover it - 2 Ill 676 681

It seems that a chose in action of a negotiable nature may pass as a donatio causa is - but if not negotiable the better opinion seems to be that it will not pass - Why not? Chancy may protect the Cepignorts as in other cases. 1 P.Wms 441 3 242 357 2 Ves 431 41 8 Leth. 214 -

Devastavit

This is the mismanagmt. of the effects of the deceased in squandering & misapplying the effects by Exr in contravening to the trust & confidence reposed in him for which he shall answer out

of his own proper assets as he had or might have had assets. 1 Vent. 150 Godb. 203 1 Cons 254 2 Ba 430.

Any act or negligence of Ex or Adm by which the obligee lost or injured subject him to a devastavit on which exn. the law proceeds goes - as releasing debts at a discount - submitting to arbitrement & awarding less than was due (Hob. 138) when in these cases a bond is given he may be charged on the bond.

If an Ex uses testator's goods as his own there is a devastavit & they may be taken in exn as his own - so if the same thing namely the husband of an Ex. 1 Bos 293

It is a question whether a devastavit will lie against an Ex. in Ct. since if a creditor succeeds in this action he recovers to the whole amount of the original assets & may thus defeat the average bond - the proper remedy in this case seems to be an action on the bond

If there are two Exs. one is not liable for the devastavit of the other unless he has actually or indirectly contributed to it - for a devastavit is in the nature of a tort Hob 320. Cro E 318. 11 Ves 576

If of two Exs. one has had assets & the other none & the latter has committed a devastavit both may be sued in the first instance in the usual form & judgt. may go against both - but if no assets are found now art will be returned a Sci fa will go against both & then judgt. will go against the receiver only

In Ct. exn. in this case goes against both.

Executors lending money on personal security are personally liable if the security turns out deficient Pa. Ch. 253 3 Swan 80 n 84 n 63 1 Cox 24 2 do 1 Cowp 6 3 Mad 62 Franks v Webster 4 Ves 103 Lentine 1 Eden 145 2 id it is their duty to call in money when lent 8 Ves 466 11 do 498 2 are liable 10 for loss if they do not 2 B.C.C. 186 5 Bro 849 Hunt D. 299 n

The admission of one ex'r are not evidence to charge the other for such is responsible for his own acts & not liable for the delinquency of the other Holler 367 1 Hen 20 4 Cowen 494 1 Johns 277 5 Mond! 5 61-

If an ad'r sell on a credit without proper security & on loss ensues he must bear it 3 Paige 459-

Each executor is liable only for his own acts unless he bound over the money or joins in their misapplication 7 Johns Ch 22. 5 do 283. 19 Johns R 427- 7 East 256 all executors by joining in the bond to Court of Probate become jointly liable for the default of each Babcock v Hubbard 2 Ct. 536 Knapp v Hanford 7 Ct 138

Tho. an action will not lie agt. an Ex. for a fraud of the testator which does not benefit the exect yet it will lie against his representatives on a contract fraudulently performed by him 30 John. 42 &c.

Vendor neglects to make a good title within the stipulated time executor of vendor may sue for damage caused by loss of interest or deposit money & expence of investigating title 256 L 231

Executors and Administrators

If both Exs. have signed receipts & one only has in fact received both are liable to creditors but the receiver only it is said to legatees. Ad 318 2 Bro 114 and 7 Dec. Ex. 197. 8 1 Ball. 311. Selw 814 n 40

It has been said that the old authorities support the position that if Ex. be proved a loud which can be proved numerous he would be liable to account to the whole amount (Hob. 187.) Modern authorities contra & that he is liable only to the amount of the surplus over the legal interest & equitable sum – Comyn.

Actions by and against Executors and Administrators

An Ex. stands in the place of the testator & represents him as to all his personal contracts & therefore may regularly maintain in his right which he himself might. Co L 377. Roll 912 – Saul. 118. 33 Pop. 189 Seow. 193 2 Bro 439 1 Com 241.

In some cases the testator might sue where the Ex. cannot – There are also some cases where the Ex. might be sued where the Ex. cannot be – Rule – laid down – that Ex. is liable for the contracts but not for the torts of testator – But neither branch of the rule is strictly true – for there are cases in which Ex. he is not liable for testator's contracts & others in which he is liable for torts &c – Rule appears to be this – If the tort committed by testator he has benefited his estate Ex. he is liable – Seems if the assets have not been benefited the the other party may have been injured by the tort – Rep. of cases deciding Co L 23. 2 Bro 143 Comyn 372. 3 Wh 519.

At C.L. Ex. was not liable for any tort committed by testator

& their present liability is derived from the equity of the 4th Eds. (1 Com 241 1 Dast. 30) Does this St. impose a liability on the Exr. &c. or merely give them a right of action? 2 Ba. 139. 45

Where a right of recovery for testator's tort &c. survives against Exr. &c. the action but must not sound in tort but in contract & the usual mode of recovery is by Assumpt. which cannot be traversed. Cowp. 172 372 3 B&P 549 4 Mod 403 Salk 314 Sd. 96 971. 502 1 Vent. 30.

If an action which would survive against the Exr. is brot against the testator & the latter dies pending the suit the action does not abate — Semble if the action is such as would not survive Ref. Cases in B. 23 Co. 2 377. Sealb 168 9 Co 87.

If therefore an action is brot against testator on a right of recovery which would survive against Exr. & the action sound in tort the suit must necessarily according to strictness of principle abate & Pl. must resort to an action sounding in contract against Exr. Cowp 372.

Where the action as well as right of recovery is such as would survive against Exr. a Scire must be issued to summon the Exr. to answer to the suit. (Co. 2 377. Sealb 168 9 Co 87.) So if judgt. has been recovered against testator & he dies before it is satisfied Sci. fa. lies against the Exr. 3 East. 2.

In a Sci. fa. against [illegible] an Exr. he cannot plead any matter which might have been pleaded in the original action. Kirby 25 b 87. Sal. 2 Co. 2 283 Mod 182 —

To an action brot by an administrator a plea that testator intestate made his will &c is bad unless it traverse his dying intestate Yelv. 115 1 Brownl 97 S.C. Com Dig 156 vid. Cloyt 66 2 Brownl 184 Com Dig 2 Ed 4 E.R. 1208. Lev E 102.

If one is sued as executor & pleads that he is administrator he need not traverse the dying intestate Semb if he is sued as administrator & pleads that he is executor 1 Sal 207 in 5 Mod 115 the case in Yelv. supra denied vid Holt 307 S.C. 6 Leith 363 S.C.

In an action against an ex for a legacy proof that any proof of the testator came to his hands & that the ex has neglected to make an inventory thereof is suff to authorise the jury to find assets suff to pay the whole legacy 7 Ct 135 1 Pick. 20.

An action at law for a distributary share cannot be maintained agt the ex the he has expressly promised to pay - he is to distribute as equitable by H. taking bonds &c 14 Ch 97. 5 Ch R 690 Comp 284 289. 1 B & B 219

If after judgt. reversed by adm. his administration is repealed he cannot legally take out exn. If an audita querela lies to discharge Deft. from the judgt. on agst. the first admr. 2 Saund 148.

So when Deft. is in exn. at the suit of an exr. if the will be annulled audita lies Dy 203 8 Co 144 -

Said in 3 Leon 278 that audita lies for one in exn. at the suit of an admr. durante minore aetate if the exr. come of age whilst Deft. is in jail Yelt. 125 a n

Yelt. 83. Deft in exn. arrested on motion where adm. was repealed in Hy 4 17 discharge on motion refused - party put to his audita

1 Bro 428 said by Eyre that the modern practice is to interpose in a summary way where the party wd be entitled to relief on audita -

If exr. submit to arbitration he is bound by the award & cannot in an action upon it shew want of assets

15 Co 4 18

Executors and Administrators

Barnard that there are also some contracts of the testator's which will not survive against Exr &c – Rule – That where (as is usually the case) the contract is such that testator has received or is to receive any consideration from the other party on performance of the contract the Exr is liable – But where according to the contract the testator was not to receive any consideration moving from the other party but a compensation arising solely from his performance of the contract & in which the other party was not interested if he fails of performance thro mere negligence his Exr &c is not liable – As if an Officer who is to receive legal fees from the exn of process fails thro negligence to execute it. 1 Lev. or Swift 429.

Is not this the rule? that the Exr is not liable when in presumption of Law testator's effects have not been benefited – As where testator was to do some act & to receive pay merely for doing it (whether the consideration moves from the other party or not) & neglects to do it – This rule Bank. is right – but S.R. opposes the rule supra –

In trover no action survives against Exr in those cases where testator might have wager his law. Cro. E 100.

In some cases also the Exr cannot maintain an action where testator could – Rule – If the tort committed against testator has injured the effects the Exr may maintain an action for damages, otherwise not. 2 Bac 445 –

Where a suit is commenced by testator & is of such a nature that would survive in favor of Exr & testator dies before judgt – Exr may make himself a party to the action by

Executors and Administrators

suggestion of Pltff death on the record & entering his name thereon Cro Eliz 577. Salk 168 9 Co 87.

By Wms d. Ill. if Deftt die his Exr must be notified in which case he becomes a party to the suit & judt goes against him as Exr - But if Pltff. die & his Exr neglect to enter his name Deftt would be remediless -

The Exr may sue in his own name when the cause of action is founded on a contract of his own or has accrued since testator's death. 4 B & P 280 2 Ld Ray 128 1 Show 57.

The Exr when sued by testator's creditor is not allowed to take advantage of H. Limitatn - if he thinks the demand just he may suffer judt to go against him without being guilty of a Devastavit. 1 Salk 524.

In gent an Exr is obliged to avail himself of every illegality in the consideratn of a contract - But it is doubtful whether this rule extends to debts which in honor & conscience ought to be paid - the Exr is not perhaps warranted in avoiding all those legal advantages which testator might.

N. A count for money had & received to the use of Exr as such may be joined with a count for money had and received to testator's use. 3 East 102. 4 B & P 359 359.

If that for which Exr sues will when recovered be assets in his hands he must sue in his representative capacity. 4 B & P 281 3 East 104 Contra 7 B & P 359 5 Ld 234 3 Bos. 7. 2 Saund 117 d. n

Where there are several executors all must join in a suit tho, some renounce 5 Mand. 313 9 Co 37. 10 Co 13. 1 Saund 291. 8 3 Ba. 32 – on demurrer to those who will not join there will be judgt. of abeyance 5 Mand. 314 3 Ba 32. Cro. J. 420. Roll 444 –

Sondes if a count agst. admr. as admr. for a debt due the Off from the deft. as administrator, with a count for a debt due from the intestate in fact – without shewing that the intestate was liable for both debts 3 Mand 244 the one count shewing a personal liability & the other a representative one 4 Tolm 440 12 do 349 7 Comm 58 2 Saund 117 d. a 2 Bos 421 / 10 Co 205. b 2 do 61. 2 m / 8 Mand 531 x also that the rule does not hold a common in suit by admr. – 3 East 104 6 do 405 contradicting 2 Saund 117 a. n. 2

N. Sdeo qu. for money received to the use of exr. after the death of testator gives a different cause of action to the exr. from that which accrued to the testator by the receipt of the money in his life time – in the last case the exr. must sue as such & is not liable to costs – but in the former he need not sue as exr. & is liable for costs even tho he does so sue. / 2 Bos & Pul 431 1215 / it is as much of a new contract as if a bond had been given to him as exr. in which case he could not join a count on such bond made to him as exr. to a count

on a promise for made to the testator 10 Mod 316. 2 Saund 117 B. to. n 2

A of such misfeasance either by or against ex. [illegible] on part. [illegible] Mod ... 88
in cases of [illegible] or [illegible] 4 TR 329 Ch. Bl 408 & Bro 424 2 Sw. ... 228.
But a bond or an account stated with an ex. for money due from testator may be joined with a count on a promise made by testator / 1 Ch Bl 102 / Common matters to stand the 1st Sess. 2 Saund 117 E. n 2 but a count for money paid & rec'd as ex. cannot be joined with a count for money due the Off from deft as ex. or with a count on an account stated for money due from deft as ex. 14 Ch 77 2 Saund 117 B

A person suing as ex. or adm. without a probate or letters of adm. may take them out at any time before the hearing & it will be suff. 2 John Ch 18 4 do 551 7 do 51 —

Costs given by adm. for intestate, deft. plead fen. want of consideration 9 Mass 275 8 John 120 17 do 304 Saund 210 n. & the fact that the payment was on trial further, no presumption that fulsomness was the consideration 9 Mass 278

Executors and Administrators

Is the Exr. obliged in all these cases of this kind to sue as Exr. or does the rule mean that unless he sues in this way he is liable to costs? It cannot mean that he is obliged to sue as Exr. nor is he exempted from paying costs in all cases. 4 B & R 278 2 Ch. 125 7 Ch. 358 5 Ch. 23. 234 1 Show 87 7 Bro C 550 3 B & P 307

Pff. cannot join in one declaration a cause of action which accrued to him as Exr. with one in his own right 4 B & R 260 Ch. 489 3 Bos & P. Stra. 1271 & 348

When a promise is made to an Exr. or Exx. he may sue as Exr. 13 R

If an Admr. bind himself as Admr. he is personally bound & cannot plead plene administravit. 1 B & R 691 5 Ch. Comp 284 to 92. 2 Ba. 488

Gent. rule - that when an Exr. sues & is defeated he is liable to no costs - At C.L. no person was liable to costs & the St 4 & 8 which governs upon this subject subjected no one to costs except those who sued in their own right. 2 Ba 446

The rule that Exrs. & are liable to no costs except in special cases applies only to Pffs. who are Exrs. & 4 B & R 645 5 Burr 1461 584 11 Bos 445 2 H Bl 277. 7 Ch. 55 66 2 Ba 446 2 Bos 255 2 East 395 Mod. 183 Cro. 503 1 Mod. 165.

There is one case in which an Exr. Pff. shall be liable to costs - this is when he brings an action in his own right - as for a trespass in his own time Stra 682 6 Mod. 94 181 Dent. 92

Executors and Administrators

Ex^r sued in his own right judg^t is de bonis propriis (Cro Jac 289) & when he is liable de bonis propriis ind. 2 Bos 43 b 7 Mod 182 & 348

Of Sir fa against Ex^r as to subject him de bonis propriis ind. 1 Saund 219 n 8 307. / he note indeed an admin. assets - for value rec^d by the intestate & his heirs is ind for want of initial ^t & 2 Salk 312 20

Assets inter manus

All the personal estate whereof testator died possessed whether in chattels real or personal belong to the Ex^r and are assets in his hands for payment of testators debts & legacies 2 Bos 416 Want. 52.8 Gold 180 Ind also 1 Mod 251 259 1 Ath. 477. 8^d 13 1 Bos 594 4 Bos 417. 57 Esp 594 1 Bull. 34 Stra 1142 Leach 208 2 East 88 8th 38 6 Mod 377.

Genl rule that all personal property goes into the hands of Ex^rs & the rent into the hands of the heir - yet there are some things which seem to be personal property which go into the hands of the heir & some which appear to be real which go to the Ex^rs - Ex^rs deer in a park to the heir - ceus if tenant - So annual rent on land tho seemingly personal property goes to the heir while wheat at testator's death payed to Ex^rs 1 Salk. 55 2 Bl

In Ct. no provision is made for the disposal of the residue of an estate pur autre vie when the tenant dies during its continuance - In Eng it goes to the heir -

Emblements are sometimes considered as personal & sometimes as real property (2 Bl 122. 46. 404) they prop. of course by a deed of the land & if an injury is done them it is a tres pass

The ex^r or adm^r of a deceased ex^r or adm^r stands to have rec^d monies in that character tho, sometimes treated as a mere debtor to the estate of the original testator or intestate is properly made a dep^t with the continuing ex^r or new adm^r of such testator or intestate in a suit for the administration of his assets 8 G. & E. 487 - But at law the ex^r of an adm^r cannot bring a suit or in Eq. sense a bill lies, by the adm^r as such Mk. 203 2 Atk 44

Whenever the same recovery would be assets, the ex^r may sue in his representative capacity Eq. Note taken or indorsed to him for goods sold or money due the estate 4 Vesy 504 1 Ath 487 6 East 405 1 Barn & Cresp 150 10 Bing 51 2 Barn & Cresp 149 overruling 10 Mod 316 3 Bos & P 7 6 Taunt 453 9 Ves 334. Therefore where a Bond was taken to two executors for a debt due the deceased & one of them assigned it to a bona fide holder & misapplied the proceeds the assignment holden good 4 Vesy 507 19 Ves 153 McLeod & Drummond 7 Johns Ch 150 9 Cow 320

y me reino & y en injuria a ella llamo it is a trespass

But as between the heir & Exr. they are always considered as personal property & also between the lord & tenant when the estate determines at an uncertain time - qu - as to roots the digging of which is an injury to the freehold - (2 Bl 123 - 1 Inst. 55 -) They go to the Exr (Semb) as well as to tenant for they are emblements not fixtures.

By the old law every thing affixed to the freehold however slightly was considered as a part of the realty - but the rule is now nearly reversed - for whatever is merely affixed to the freehold is personal property unless its separation would materially injure that to which it is affixed This rule as now established holds between landlord & tenant heir & Exr. Esp. 594 1 Bull. 34 Stra 1142 2 Ba 418. 2 Ath. 13 -

In Eng - certain chattels are by custom transmitted like real property by descent & are called heirlooms - this kind of property is unknown in Cl.

If testator are possessed of a term for years it goes to the Exr &c. If a lease for years come to the hands of the Exr &c he must annually add to the minority the surplus of the profits (if any) after allowing for payment of rent & the rule is the same with respect to all annuity profits Cro. E 712 -

If testator seised in fee make a lease the rent on his death goes to the heir - So all reversions however distant are real assets in the hands of the heir & Exr may go against him immediately to be levied quando acciderint Cro. M. 126 1 Vern. 410. 2 Vern 184 2 Ath. 294.

Equities of redemption on testator's mortgages are in Eq. real apets in the hands of the heir tho not at Law -

If testator grant an estate in rev. in ea. the future interest of the heir is real apets quamdiu - If testator is mortg. or receives an estate in ea. the estate on his death is apets in the hands of the Ex. & he may compel a foreclosure - The heir in this case may compel a foreclosure if he will pay the money for which the land is pledged otherwise not. 1 Ves. 412 -

Separate property of the wife

The Law looks upon the husband & wife as but one person & therefore regularly allows the wife to have no property separate & distinct from the husband - hence all the personal estate which was hers in actual poss. at the marriage vests absolutely in the husband. 2 Ba 421 Dact. & Stud. ch. 1 Inst 351 Sid 111.

But chattel real tho he alone may make a disposition of them yet if he does not in his life time they shall survive to the wife & not to his Ex. - So also of choses in action or debts due to the wife if he die before he reduces them to poss. or any alteration made in them they belong to the wife. 1 Inst 46. 351. Noll. 342 Pesh 5. 97 3 Mod 185 2 Ba 422.

As to wife's paraphernalia vid 2 Ba 1122 Noll 911 Cro E 343.5 (Doug Hastings vs Arch) 2 Vern. 225 Moor 213 2 Leon 166 Pr. Ch 27 2 Vern. 83 -

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Pa. Ch. 27 2

Executors and Administrators

Administration Bonds

Administr. must give bonds for the faithful discharge of their duty in Ct & Eng. 2 Bac 377. Carth 457 P. W. 361 So in Ct. must an Ex. by St. 166 - Secus in Eng. the Chancr. may compel him to give "caution" i.e. security he being a trustee. Show 294 Carth 457 2 Bac 376 P. W. 361.

No person can be Adm. till 21. - for before that time he cannot give bonds. 3 Bac 121. 21 Carth 446 5 Co 29 Sal 39 P. W. 338

In Ct by St. a person may be Ex. at 17 & by another St. bonds are required of every Ex. - qu. Is the bond of an Infr. Ex. binding contrary to the C. L principle? Is the law allow Infr. to be Exs. & obliges every Exr. to give bonds it should seem in this particular case the Infr. bond would be good. 1 Bend 76 5 Co 27 3 Bl 1 Swift 172 315 - 1 Burr 1802 -

If the Bond (in Ct. Exr.) does not inventory or makes a false account or does not account he forfeits his bond but the nonpayment of a debt is no forfeiture in Ct. or Eng. nor is it a devastavit in Eng. (Sch 316)

Whatever is a devastavit in Eng. is here a forfeiture of the bond - So is non distribution

A Creditor as well as next of kin has a right ex delicto justitiae to sue upon the bond & the Court may direct the Judge or Ordinary to allow it - Coupe 140.

Executors and administrators

Distribution

After payment of debts & legacies Exr is bound to make distribution of the personal property. 1 Com. 352 2 Ba 426 398 Lev. 66 2 Ch. 515 2 Pr. 447.

The mode of distribution established in Eng. & imitated in Ct is settled by Ks. 22 & 23 Car 2 which enact that after payment of debts & legacies & widows share the surplus shall go to the children & their representatives - if no children - to next of kin & their legal representatives. 2 Lev. 66. 73 -

The Civil law rule determines who are next of kin pointed out by the Ks. both in Ct & Eng -

The distributary share vest in the intestate, living at his death & of course are transmissible tho the claimants die before distribution (2 Bac 429) (it rests even in an Exr in ventre sa mere & in Eng no distribution is made till after a year & day from intestates death (Lev 66) (Qu. this last rule obtain in Ct?)

The personal estate first goes to the next of kin in the descending line & their legal representatives - i.e. - to the children if any & their issue in infinitum - & so long as any of the old stock remain in any of the lineal degrees the estate goes per stirpes jure representationis. 3 Pr. 56. 66 2 Ves. 213 Pr. Ch 28.

But after the old stock is extinct the estate is distributed per capita (1 Eq. 286 contra) Lev 71 2 Ba 429 Pr. Ch 54 Eq. 249

Some contend that the distribution in this case is per stirpes

use
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must a between the whole & half letters - for the Civil Law

to
2 Dec.

But of
per capita

Some contend that the distribution in this case is per stirpes

Judge agrees with the above rule. Means supposes that where there is no representation as in this case the distribution cannot be per stirpes

If there be no issue of deceased or legal representatives of such issue the estate goes to the next of kin in the ascending line & their legal representatives - & of persons related in equal degree to deceased no preference is given to one over another except those in the ascending line excluding ancestors & collaterals whatever may be the degree of kindred.

In the Civil Law proximity in the C.L quantity of blood is regarded in calculating the degrees of kindred -

The right of representation among collaterals extends no further than to the children of brothers & sisters - Beyond this degree kindred can claim only in their own right - if therefore the brothers & sisters of the propositus are dead & part of their children also those (nephews & nieces) who survive shall take the whole estate to the exclusion of the grand children of the brothers & sisters &c of propositus. 3 P. Wms 50 2 Ves 213-15 1 Atk 454 Bac 250 1 P. Wms 25 394 Pa. Ch 54

A. St. Law. follows the mother in the same rank with brothers & sisters in the distribution of personal property - But we have no such law here & even in Eng this degradation of the mother takes place only when there are brothers & sisters or their legal representatives children living

In the distribution of personal property no distinction is made between the whole & half blood - for the Civil Law

which regulates the distribution regards proximity not quantity of blood 1 Com 816. 23 2 B/ 405 Hy 4 16th. 458.

If the father of a person deceased is living the mother takes nothing for whatever she might take would rest immediately in the husband.

Hatter a devise a minute of father & mother for superiment comes the son dies the father & mother living it is doubtful whether the mother would take any thing - tho it seems on principle that she has a good claim - If the devise were a mensa & she would not while husband was living have any claim to the personal property of her children - for the husband's right to her property still continues - even after his death - & all otherwise after the husband's death & hence the marriage was not ab initio void.

According to Eng decision the brother takes to the exclusion of grand parents - qu how the decisions reconcilable to the governing rules? 3 Atk 26 / 32 2 B/ 304 Cad 4 Cod. 753

Children in ventra sa mere are by the Civil as well as C. L considered as being in esse & capable of taking property by the rules of descent & distribution & an injunction to stay waste lies in favor of such Infts 2 Atk. 15 2 Com 174 710 Pr. Ch. 30

Personal estate is distributed according to the laws of that country where intestate resided at his death 2 Hy. B/ 401 Cond 25. 2 Ves. 35

Distribution is compellable in Chancy 1 Com. 134 2 Dent 362 1 Com 254 2d 204

An executor who takes nothing under the will is a competent witness to prove its due execution 8 Ct 242 & so of any trustee. 11 Ct 519.

Lancing 16.1 S.

If an alien enemy die in this State his estate will go to his next of kin residing here 13 Johns R. Law 1. Johns C 288 S.C

1 Dom 254 2d 204

Executors and Administrators

If the legal interest in lands descends ex parte materna & the equitable ex parte paterna or vice versa the equitable merges in the legal & both follow the line thro which the legal descended Bacy. 741.

Cases of Distribution

1. S.S. died leaving a wife & three children.

A. One third goes to the wife & the remainder to the children each taking an equal share.

2. S.S. died leaving no wife but three children.

A. The estate is divided per capita among the children.

3. S.S. leaves two children & the rep. of a third child who is dead.

A. The two children take each one third & the grand child the remaining one third as representative of his father.

4. S.S. leaves a child C. his child A. is dead but left a child D. & his child B. is dead leaving children E & F.

A. C. takes one third D. the grandchild of S.S. takes another third being the legal representative of A. his father & the remaining one third is divided between the children of B. as his representatives — for representatives take per stirpes.

5. S.S. his three children are dead but A. left a child D. B. left E & F. & C. leaves G. H. I.

A. The children of A. B & C. take per capita — for the old stock being dead representation ceases all being in equal degree.

6. S.S. left two children B. & C. his child B. is dead so is his child D. leaving E. & F.

A. The children B & C take each one third & R & S. the remaining one third as representatives of their grandfather C.

7. S. left a wife but no issue - his father Reuben & mother Mary, his brothers & sisters of the whole blood John Pike & Sally & of the half blood John Stiles & Susan Rogers & his uncles George & John Stiles

A. The wife takes one half by the St. & the father the other half of the estate.

8. The only relations living were John Pike & Sally, brothers & sister of the whole blood - John Stiles & Susan Rae of the half blood - & his uncles George & Edmund Stiles.

A. The brothers & sisters of the whole & half blood take the whole per capita in exclusion of the uncles - they being in the second & the uncles in the third degree of kindred

9. John came on the last only Jonas has since died without issue & so is John dead but left a child M.

A. Pike & Sally are entitled to two thirds of the estate being next of kin to the deceased - M. the child of John is entitled to the remaining third being the legal representative of his father - Jer. n.

10. All the brothers & sisters of S. except Sally are dead but M. the child of John left N. & O. - the children of Pike are living

A. Sally takes one third of the estate as next of kin. M. the legal representative of John another third & N & O the residue being the representatives of Pike.

11. All the brothers of S are dead - John left M. Pike left N. & O. & Sally left children P. Q & R.

Executors and Administrators

A In this case the stock being extinct representation ceases hence the uncles of J S George & Edmund together with the children of Jonn. Rich & Betty divide the estate per capita being all in equal degree of kindred

12. Same case as the last only George & Edmund are dead without issue.

A Here M. N. O. P. Q. & R being next of kin divide the estate per capita

13. Same case as the last only M is dead leaving 1. 2. & 3.

A. N. O. P. Q. & R. take the whole estate to the exclusion of the children of M. for representation extends no farther than the third degree of kindred.

14. M is dead leaving 1 & 3. So are N. O. P & Q. - N left 4. O. left 5 & 6 P. left 7. 8. 9 & Q left 10.

A R takes the whole estate as next of kin to the exclusion of the children of M. N. O. P & Q.

15. R is dead leaving 11. 12. 13. 14 -

A. The children of M. N O P Q & R divide the estate per capita being next of kin to the deceased.

16. George left 15. & Edmund left 16. & 17.

A. The children of George & Edmund share the estate with those of M N O P Q & R being all in equal degree.

17. The only relations of J S living at his death are his Grandfather Solomon & his brother John.

A According to the Gent. rule Solomon would take equally

with Tom. but this case is an exception & Tom takes the whole.

18. J.S. died leaving his grandfather living, an his brother Tom & his mother living.

A. Had it not been for the St. 1 & 2. the mother would have been entitled to the whole being in the first degree. but now she is entitled to an equal share with Tom the grandfather being excluded as in the last case

Q. The same as before only Tom is dead without issue.

A. The mother takes the whole estate - for the St. does not operate against her only when there are brothers or sisters or their legal representatives living.

21. The only relative of J.S. at his death is Tom. but his sister is born after his death (qu. How can this be)

A. Tom & Sally take the estate per capita for posthumous children are considered as in esse & take equally with the others.

Distribution of real and personal property under the Statute of Connecticut.

Before the revision of our laws in 1884 our St. of Distributions was as to all estates the same as that of Con. 2 is to personal property - The real property & personal is distributed after the share of the wife is set out to her under this St to all the children of intestate in equal shares - Representation in the descending line extends in infinitum provided any of the old stock remain & it is immaterial whether the old stock be in the first degree collateral to the father or any other more remote lineal ancestor of the person claiming jure representationis Lect. 71. (1 Sec. 262 contra) 2 Woodb. 114.

It is true, that they ought to be revised and conferring to diff.

By what law must the estate be distributed among creditors – of the place of domicil or of administration?

5 Pick 518. 523. 9 do 518

Lord 71. (1 Sw. 262 contra) 2 Woods 114.

If real estate come to the intestate by descent devise or deed of gift from his parent ancestor or otherwise it will go to his brothers & sisters & their legal representatives "of the blood of that ancestor" from whom it was derived

The construction this last mentioned clause of that St. has epitomized much dispute & no legal decision has settled the dispute as to the phrase "of the blood" this under the feudal system (2 Bl 220) signified "lineally descended from". & it has been contended that this is the meaning of the phrase in our St.

According to this construction the person claiming must be lineally descended from the ancestor from whom the estate came (& even brothers & sisters cannot inherit unless the estate descended from their lineal ancestor a consequence manifestly opposed to the intention of the St.) & then if by the former clause we are to understand "next of kin" to refer to the ancestor instead of the intestate the person claiming must be lineally descended from & next of kin to the ancestor from whom the estate &c—

In many modern Law writers "of blood" means nothing more than "of kin" or "related by blood" - in this sense I K supposes the phrase used in our St.

It is acknowledged that the St. as it now stands does not easily admit of this construction - for if "next of kin" & "next of blood" refer to the same person as they seem to grammatically the latter phrase is superfluous as it conveys no idea which is not fully conveyed by the former - to make out the construction it is that, that they ought to be considered as referring to diff.

persons - thus "next of kin" to the intestate & of the blood of the ancestor from whom he. This construction seems to be sanctioned by the gen.l tenor of the St. & from other considerable reasons in support of L.K's construction -

1. The phrase "next of kin" when used by legal writers always refers to the propositus.

2. The "next of kin" are in this way St. provided for after brothers & sisters - But in many cases the brothers & sisters cannot be next of kin to the ancestor or lineally descended from him - if the contrary construction were adopted & could be extended to the brothers & sisters it would require them in many cases of what the St. expressly gives them.

3.rd If brothers & sisters are lineally descended from the ancestor from whom the estate came as is generally the case then in most instances the preceding clause respecting brothers & sisters makes exactly the same provision as is made by this disputed clause upon the feudal construction of the phrase "next of blood" - for according to this construction brothers & sisters are generally the only persons answering the description & of course the description of them exactly by the word brothers & sisters is unnecessary -

In a subsequ.t clause of the St. relating to personal property & such read as is acquired by purchase in its limited sense it is omitted that if there are no brothers or sisters of the whole blood nor parents the estate shall go to the brothers & sisters of the half blood - but it does not as the St. now stands go to their legal representatives - This is not conformable to the gen.l rule

for in all other instances representation extends to the brothers & sisters - By this H the children of brothers & sisters of the half blood are totally excluded - This at seems was not the intention of the Legislature - for in the original draught of this H. by Judge Thomas the term "legal representatives" was placed as referring to brothers & sisters of the half blood & not to the next of kin as at present.

In these estates acquired by purchase in the limited sense of the word the order of distribution in defect of issue is 1. to brothers & sisters of the whole blood & their legal representatives - then to the parents - then to brothers & sisters of the half blood & their legal representatives & then to the next of kin - those of the whole in equal degree being preferred to those of the half blood - Representation extends no farther than to the children of brothers & sisters of the intestate as in Eng. So decided by the C.E. in the case of land which came to the intestate by descent - but the Court was clear that the restrictive clauses extended to all kinds of estate however acquired by intestate. Stowe vs Randle -

This last rule extends to every kind of estate real or personal ~~however~~ acquired by descent or purchase

If one die in Ct. having no heirs or representatives his property real & personal goes to the State. R. 162.

Advancement

By H. Cap 2 every child except the heir at Law of the who received an advancement from the Father during his life shall in

The advancement is to be estimated according to its value when made & not at the time of the fathers death 1 Sergt. 422

The father held a bond & mortgage against the husband of his daughter & gave to them a writing as follows "I have a bond & mortgage from A.B. the land of which I "intend to give up to them as I never intend to demand it "from them nor any part of the interest due or to become "due at any time" - signed but not sealed - held to be a release of the debt & an advancement of the daughter

1 Sugden 312.

Will not this note altho not separately taxed even permit all the cases upon the subject of advancements - that where the debtor acq. property to any ~~amount~~ considerable amount for which the debtor has not & cannot receive a return that it shall be considered as an advancement 6 Ct. R Clark & Warner.

ment to be entitled to a distributary share under the Distribution bring what he has received into hotchpot - this rule however operates in those cases only in which the father died intestate as to the whole of his property. 1 Mont. 176 Pr. Ch 170 Wms 446.

By the Law of Ct. a child who has received any thing by way of advancement from the intestate in his life or a legacy at his death is not required to bring it into hotchpot to be entitled to a distributary share but such advancement or legacy to the child is amounted as part of the whole of his portion.

Advancement is given by marriage settlement is an advancement 2 Wms 435 2 Pr. Wms 434 Eq. C 449 2 Vern 638

It seems the doctrine of advancement does not prevail where a man buy property of which he is ignorant or which he does not notice in his will - Pr. Ch 170

When a man gives a greater legacy to one child than he gives to another & dies intestate as to part of his estate this is not in the nature of advancement for an advancement must be made in testator's lifetime

Purchase includes every mode of acquiring an estate except by that of descent. (2 Bl 241-4) Or title by Escheat Occupancy Prescription & forfeiture ibid 2 Bl 241 58 682-

The most usual method of acquiring title to real estate is that of alienation i.e. of purchase in the limited sense of the word. 2 Bl 287.

The word alienation comprehends every mode of vesting title by which estates are voluntarily resigned by one and accepted by another i.e. every mode of transmitting property by the mutual consent of the parties – & during the early periods of the feudal law tenant of lands could not alienate without consent of the lord neither could he mortgage for his debts or devise them – & even with the lords consent he could not alienate without consent of his heir apparent & presumptive 2 Bl 287.57

Nor could the lord alienate his seignory without his vassal's consent which was called attorning – Hence the doctrine of attorning which was extended to all lease for life or years 2 Bl 288.

During the time of Conq. the Conqueror & those of his sons land was absolutely unalienable (1 Prime 3.4 Knights Dev. 154) & for some time after the right of alienation was introduced the highest estate that even the lord could grant was an estate granted for life. 2 Bl 55 120

In the reign of H 1 a man was allowed to alienate in fee a part of the land which he had purchased but not the

whole so as totally to disinherit his children (2 Bl 288 4 Cru. 5)
But still he was not permitted to aliene his ancestral estate
2 Bl. 289

Afterwards he was permitted to dispose of all his purchased
estate if he have purchased to himself & assigns (Sem not)
& one fourth of his ancestral estate without his heir's consent
But by St. quia emptores 18 Ed. all persons except the Kings
tenants in capite were empowered to aliene their lands
2 Bl 289 4 Cru. 5.

The land however aliened by tenant (under this St.) was not
to be holden of him but of the next immediate Lord. 4 Cru. 5.
2 Bl 299

By St 5 Ed 3 the King's tenants in capite were also permitted
to aliene on paying a fine & by St 12 Car 2 the fines required
by the last St. were abolished in the case of freehold
tenures - so this St. abolished the military tenures &
turned all the ancient free hold tenures into free & common socage. 4 Cru 9. 47 2 Bl 299 77.

The power of charging lands with the owner's debts was
introduced by St Westm. 13 Ed 1 which subjected half of his
lands to a writ called an Elegit under which the creditors
might occupy till the rents & profits satisfied the debt. 2 Bl 116
289 3 418

By St. de mercatoribus 13 Ed 1 he was enabled to pledge all
his lands by a St. Staple. & St. Elegit. by 27 Ed 3 - by other recognizances
by St. 23 Hen 8. 2 Bl 160 289 4 426

Mon. cannot in Lieutn. deny Mr. title – I the rule

A recital in a will is an estoppel to preclude a mining adventurer.
3 Johns. R. 170

x but qu. whether this should be considered a technical estoppel. Ds + 1 Johns. R. 81.
1 Johns. R. 81. per Kent J

Deeds

Nature of Deeds

The legal evidences of the alienation of real property are called in Law Common assurances being the means by which a man's estate is assured to him & one of four kinds. 1. Deeds or matter in facts. 2 Matters of Record or judicial assurances made in a Court of record. 3 Assurances founded on special custom. 4 Devises — For alienation by matter of Record & special custom vid 2 Bl 344 65 —

A Deed is a writing sealed & delivered (1 Inst 171 2 Bl 295 4 Co 10) writing & sealing constitute the instrument but it does not take effect till delivered — The making of a deed is the most solemn act that a man can perform in the disposal of his property — Hence the rule that every one is estopped by his own deed. 2 Bl 295 Plowd 484. L 751

The meaning of the rule is that no man shall be permitted to aver or prove any thing in contradiction of his own deed — Thus if he make a lease to B of lands in which he has no interest & afterward purchase the lands he is estopped by the covenants to deny that he had title at the time of making the lease. Sal 276 Powell 405 3 Bl R 438 3 Keb 364 Bl R 729 1048 550 2 Keb 364 6 Mod 258 3 Bl R 371 Ego 233 1 Roll R 160 1 Inst 265 Litt p. 446 1 Root 222 2 Bl R 171 Cowp 599 1 Bl R 760

But if matter of estoppel instead of being pleaded as such is relied upon merely as evidence it is not conclusive the good evidence (3 Inst 346. 65 —) But a quit claim deed is no estoppel as to quit claimants title. 3 Bl R 370 1 Inst 265 Litt p. 446

Mor. cannot in Ejectment deny Mor. title — & the rule

is the same between lessor & lessee 1 Wms 760 & Rood 77.

If a lease is made by indenture lessee cannot in debt or cov.t for rent deny lessor's title the indenture being the deed of both parties - Semble if the lease had been only deed poll. Litt. p 58 1 Burr. 47 & Dee 146 Esp 233 306 7 Wms 537 Ld 760 -

Rule in Ct. that lessee by deed poll (Semb) cannot in Ejectment deny lessor's title. Rood 77 1 Wms 760 n

A deed executed by one of the contracting parties only, is called a sealed poll or single deed - If executed by all the parties to it it is called an Indenture. 2 Wms 295 Litt p 371 Burr. 220 4 Cru. 11. 12

If the parts of an Indenture are either bipartite executed i.e. each part by one party only - that in which is executed by the grantor is called the original & the other counterparts - but each part is generally executed by, all in which case all the parts are called originals. 2 Wms 296 4 Cru. 12

A Counterpart alone has been holden in Eq. suff. evidence of the existence of a deed & a conveyance decreed accordingly - But the distinctions at Law in 4 Cru 12 Pr Ch 116 5 Wms 405 Roshes. T 96 Salk 287

Requisites

The first requisite to a deed is that there be parties able to contract for the purpose intended - & a thing or subject matter to be contracted for - Hence in every grant there must be a grantor - grantee & a thing granted 2 Wms 296 Burr 35 4 Cru. 13

A deed shall if possible receive such construction as to effectuate the intention of the parties. Grant a deed to A for life remainder to his children his after born children shall take 1 Sugden 374

A. demises B. for the term of his natural life this prima facie is for the natural life of B. A demises to B. his executors for the term of his natural life with covt. for quiet enjoyment by B. his executors or during A's life — Held that the word his in the demising clause must refer to A. the B's name was the last inserted and 2 Co L 157

the land is in posst. of the particular tenant for his

If the whole interest in any subject is to be granted all those who have any right or interest in it should join or their interest will remain in them. 4 Cru 14 Co Litt 78

So all those who are intended to take any other interest than a remainder under the deed should be parties - for at law those who are not parties cannot take an immediate interest (4 Cru. 14. 426 1 Mut 231 Mod 313) tho one may take a remainder by a deed in which he is not a party 4 Cru 14. 1 Mut 231

Gen.l rule - All persons under no legal disabilities may convey by deed - but a person ousted of poss.n tho having the right of poss.n cannot convey to another out of poss.n - This rule is intended to prevent the sale of pretended titles & to discourage maintenance. 2 Bl 290 1 Mut 48 214 390 Co & 447 3 Co 36 Hob p. 59 1 Bulst 216 4 Cru 14

In Ec by H. 446 such conveyances are prohibited & declared null & void - the party making or receiving the conveyance forfeits one half the value of the land to be divided between the State & party prosecuting. 1 Root 100 99 402 Kirby 221

But a conveyance by the owner out of poss.n to the person in poss.n is not within the H. or E.S. - prohibition 1 Sen 310 H. 446

But the owner is not deprived of his right to convey by the poss.n of another unless that poss.n is adverse to the owners title - He must be dispossessed or ousted as our H. expresses it - Some reversions & certain remainders may be granted tho the land is in poss.n of the particular tenant for his

profit is that of the remainder man in reversion. Sk. Ca 146
1 Bro. 300 2 Vs 290.

Whenever one is in profit of another land but claiming under the owner the Lessee may convey to a third person. 1 Bro. 300.

Decided in Ca. that the St making void sales by disseisee to persons out of profit does not extend to sales made by the State - nor to sales by an Ex or Admr. under an order of probate (1 Root 100 contra) he being bound by law to sell accts in obedience to a sentence of Court - besides he is not the owner & cannot be said to be disseised - Kirby 221 1 Root 289.

Some rule of Guardians may sell their wards land in pursuance of ordence of Chancy - So of Collectors who sell for taxes. Sk. Ca 669 1 Root 491

Mortg. when title is acquired by Mortg. & who out of profit may convey his interest (Sanford vs Lockhart in C.C. 2 Root 499 in Sup. Ct contra) Mortg. being in Mortgs. power did 1 Bro. 300 that if A sell to B & continue in profit & then B sells to C the last sale is good - for A cannot claim against his own warranty - qre - for it makes no difference whether he claims rightfully or wrongfully -

Conveyances by Infts are generally avoidable only not absolutely void. 2 Vs 291 4 Cru 15

Idiots & lunatics are not totally disabled to convey their lands by deed - for by the C.L. neither an Idiot or Lunatic can avoid his own deed - for he cannot know what he did. 2 Vs 291 -

Where the name of grantee was omitted in the grantee's part of a deed it was supplied by intendment it appearing from other parts of the deed who was meant 15 Co. 300 a 2n

1 Mark. 214 10 Mod 116 3 Lev 21.

over his tenancy against the sale of personal property

If it appear on any part of the instrument [illegible] not under seal that it was the intention of the parties the principal & not the agent should be bound he is generally so but if the seal affixed is the seal of the agent the principal is is not bound 4 Mass 357, 358 1 Dall. 43 5 Binn 355 (cited 6 Ct. R 464)

his own deed - for he cannot know what he did. 2 Bl 291 -

Stra 1104 Cro 2 398 Litt § 405 4 Cru 20 4 Co 123 Saub 40 1 Bouk. 40.1 1 Inst 247 Coutier B.N.B. 202 Cond 469 cid Pr. Ch.

But the King on behalf of the Idiot may avoid his deed in the lifetime of the Lattar (2 Bl 291 1 P 303 1 Inst 2) the objection does not apply in this case - 2 the Committee of a Lunatic may do the same. 1 Bouk 43.4 2 Vern 412 648 1 Eq. C 279 1 Ch. C 112 1 Bl 305 -

But after the death of the Idiot or his heir 2 in the case may be his Admr. may avoid his deed So also may the Ex. of a Lunatic - but an Idiot cannot have an Ex (1 Bouk 45 1 Bl 292 Perk § 21. 4 Cru 20) But private intestate cannot dict be a remainder man &c (4 Co 124. 8 Ed 43 1 Bouk 45) Or an Idiot (qu) being tenant for life with power to make a jointure makes one 2 does demise dem cannot avoid it

The mere ex. of a deed by an Idiot or Lunatic is absolutely void as against his heir - but if he makes a feoffmt & delivers seisin in person it is only voidable 4 Cru 20. 10 b 8 Co 42. 12 125 1 Bouk 44 -

But if an Idiot 2 levies a fine or suffers a recovery it binds his representatives as well as himself - for they cannot contradict the record. 4 Co 124 12 125 1 Inst 247 Cro 2 187 Perk § 24

In ans to the rule that an Idiot 2 cannot avoid his own deed in Ch. Cur. Ch. C. one decided that he might avoid his bargain against the rule of personal property

Resided lately that he may in case of real property. 3 Bac 90

If a non compos purchases an estate he may on recovery of wit do it & thus make it unavoidable even by his heirs but if he die without recovering his understanding or having recovered it without assenting to it his heir may avoid it. 1 Inst 2 2 Bl 292

Lest to the conveyances of feme covert for their benefit Dis. 2 Bl 292 Cru. 20.

If one make a deed in consequence of duress he may affirm or avoid it whenever the duress is removed - So if one purchases under duress. 2 Bl 292 5 Co 119.

If a deed is made by several some of whom are legally capable to convey & others not it will operate as the deed only of those who are capable - As if one only has the interest in the subject - So a conveyance if one only of the grantees is capable of taking it shall inure to him only. Shep 71 81. 4 Cru 129 Perkins 66 4 Bl 472 1 H. Bl 613 -

By the C.L. all persons in gen. may be grantees in a deed as feme covert &c as well as persons of sane mind - for it is presumed to be for their benefit - But in the case of feme covert Suff. Sometimes their purchases are void 4 Cru 22. 1 Inst 2 112

A aliens may at C.L. purchase land by deed but he cannot hold it after office found when it goes to the King (4 Cru 22 1 Inst 2 Lep 139 Pa. Cha) but an alien friend may hold a lease of a house for years for the convenience of merchandise 2 Bl 293 -

A deed of land owned in fee by a married woman who is a native citizen executed jointly by herself & husband which and alien passes the title 4 Ct R 144

The owner of vacant cannot grant the right to enter upon & occupy them for an indefinite length of time without a company suff under the St. Frauds to pass a freehold. So a grant license to occupy one's own land as to deprive the other of one comment ~~cannot be~~ is revocable at any time the it have been executed but until revoked it is a justification 6 Hill 61 • 15 Wend 380 17 Ow & Batt. 1191 7 Taunt 374 2 Ellis & B 551 7 Bing 682. Green L.R 117 5 do 9.13 5 Barn & Cresp. 221 3 Kent 441 6 Wend 461 464

In a deed by a Corpn" they must under the seal show clearly that they are a Corpn" in order to be considered 8 Johns 378 / & a Corpn" cannot act in any deed but in its corporate name - 1 J. Ch R 132

Individuals acting together for the benefit of a Society are not to be considered as a Corpn" unless their corporate capacity be expressly shown 1 Johns Ch 319.

A Corpn". can act only in the mode prescribed by law creating it & the acts of its agents are no further binding upon it than as they are done in pursuance of that law. 1 Johns R 109.

Where trustees being a Corpn" sign their names separately to a lease and affix the Corpn". seal separately to each name it is argued ex". of the lease, 3 Johns R 226 / But if A.B. & C.D. executed a lease in their corporate name & with a bond with their individual names & seals the corporate name is merely descriptive & they are liable in their individual capacity - 9 Johns 334 / & A.B. & C.D. President & Directors &c —.

2101 245 —

Corporations

Deeds

In Ct. Aliens are disabled to hold or purchase land without special licence from the Legislature - Exception in favour of British Subjects who owned land here before the cession & remaining to French Subjects the rights to which they are entitled under our treaty of amity with the French King Louis 16. St. 299. 350

Special licences are usual when application is made for them - Those who are naturalised under the Laws of the U.S. are not within the prohibition of the St.

Corporations

By certain Eng. Sts. alienations in mortmain i.e. to any Ecclesiastical or other corporations are in some cases prohibited & in others much restrained. 2 Bl 256 Pr 419 4 Bruce 6.

We have no such St. in Ct. Here Ecclesiastical & many other Corporations may purchase land - But we have a Stat. that all lands be granted for the support of the gospel ministry - or of schools - or for the relief of the poor or for any other public & charitable use shall forever remain to the use to which so thus making them inalienable (St. 133) tho this St. has been evaded by long leases for a sum in gross & our Courts have sanctioned the evasion

Consideration

No deed must be founded upon a lawful & suff.t consider.n. It is said not to be necessary at C.L. (before the statute of uses & surplus) that any consideration should be expressed in the deed. 4 Bruce 24 2 Bl 296 Plowd 308. Not necessary now if a ~~good~~ valuable consideration can be proved 10 Johns R 456

742 Consideration (Deeds.)

But under the Law of Uses a deed without consideration, seems to enure to the use of grantor, i.e. the beneficial interest for the legal estate results back to the grantee unless expressly declared to be to the use of another. Rob. St. R. 85 2 Bl 136 291 329 330.

And now since the St Uses 27 H. 8 has executed the use a deed without consideration is said to enure to the use of grantor at Law. but a consideration either good or valuable is suff to raise a use. 2 Bl 332 2 Vb 338 Park 533 1 Rand 37 4 Cru. 181 1 Mod 263 Mow 684

Sed. qu. whether the rule that a deed without consideration enures to the use of the grantor applies to any other deed than that of Bargain & Sale which has its operation by St. of Uses & being never operative when founded on any other than a valuable consideration 2 Bl. 296 Ch. on Uses 221 1 Co. 176 1 Ch. Pl 351 Ld. Ch. 85. Cro J 606

In Eng. a deed declaring no use enures to Grantor. Co. Lit 9.

Sed qu. whether the rule that a deed without consideration enures to the use of grantor applies in this State. since the doctrine of uses was never received or the practice of conveying to uses ever obtained here (1 Ro. 30) But a consideration is always inserted in our deeds ex abundanti cautela.

Consideration are either good or valuable. A good consideration is that of kindred or natural affection towards a near relation. Valuable is one in which there is a pecuniary value. 4 Cru 25 2 P. 1059. Rob. S. R 129 2 Bl 297 444 3 Co 83 95 1 Pow C 361 1 Bank 336.

Marriage is always deemed a valuable consideration 4 Cru. 24 2 Bl 297.

A deed of Lands without consideration is inoperative 3 Johns R 484 16 do 48 therefore in a deed of bargain & sale where the only consideration expressed is that the grantee shall support the grantor during his natural life is void the deed not being executed by the grantee & there being no agreement on his part to furnish such support – 16 Johns 47 –

Qre. whether any consideration except money will support a deed of bargain & sale – 16 Johns 47 –

In Lefore of the ex: Should Lew That the true consideration is not set in the Lease or he enables the ex to commit a fraud by concealing assets 10 C. E. Ch 445

203 Wes. 127.

Parol evidence is admissible to shew that the consideration expressed in a deed to have been rec^d by grantor was not in fact paid to him 20 Johns 339 — so to shew a fraud in the sale 20 do 49

Mere failure of consid^n is no defence at law agⁿ^t a deed or specialty 130 — 2 do 177

* Where the consideration is expressly stated in a deed yet it not sound when for other considerations proof of any other consideration is inadmissible. 17 Johns R. 341 & if not truly stated the party must seek relief in Eq. on the ground of fraud or mistake D 160

Consideration — Deeds

A consideration good or valuable will support a deed of conveyance as between the grantors & their representatives — this a conveyance on good consideration only as against creditors of grantor & bona fide purchasers under him is fraudulent & void. 2 B & P 209 9 East 39.

The consideration expressed in the deed cannot be denied by grantor or his representatives for the purpose of defeating the title they being estopped by the deed. 1 Roll R 340 2 B & P 205 4 Mod. 434 1 Co 210 1 Root 149.

But they may impeach it for illegality or usury & strangers or creditors of grantor may deny its existence. 2 B & P 209 2 Dent. 109 2 Wils. 344.

A deed expressed to be for divers good considerations is considered as expressing no consideration for the Court cannot from this denomination judge of the sufficiency of the consideration 1 Co 176 Hob 151 2 Roll 783 2 Co 16 Cro E 394

The words "value received" have been holden sufficient — for they imply a valuable consideration (3 Johns. 284.) But the grantee may aver & prove the actual consideration — for this does not contravene the deed. 1 Co 176 2 Co 76 Ch. 39 2 Roll. 786 5 Co 26 4 Cru 38

So where the consideration expressed of £10. received of A's bonds were limited to A for years remainder to B & C one answer was admitted that the deed was given as well in consideration of a marriage between B & C as of the £10. Hence it seems that if the deed make no mention of a consideration the true consideration may be proved by parol (see qu.) 1 Co 176. 76 Ch 39 2 Co 76 4 Cru. 38.

Been decided that where a precise consideration is expressed in the deed no other can be proved. 7 Johns 342 Ch 139 3 Co 60. cited. 2 B & P 203 Wes. 127.

If it appear in a deed expressing no consideration that the conveyance is to the wife or child of grantor the deed imports a sufficient consideration from the relation in which the parties stand - here no averment of consideration is necessary. 7 Co 39 Plowd 304 1 Roll. R 58

But if a specific consideration is expressed no other can be implied on the face of the deed - E. bot to stand seised in consideration of £10. paid by a son - here the consideration of natural affection is not implied - expressum facit cessare tacitum. 7 Co 39 Plowd 308 5 Co 97. Contra 1 Johns Ch. 4 Hill. S.R 135.

Acknowledgments in the deed of the receipt of the consideration are not conclusive on grantor - only presumptive evidence - it being more for note to remove the title & prevent a resulting trust. 1 Rev Cod 479 2 Co 99 3 Johns 492

Every deed must be written or printed & on paper or parchment. but it may be in any language or character. 2 Bl 295. 1 Burl 229 4 Cru. 25.

Formerly writing was not necessary to the conveyance of land but now by 29 Car 2 no interest in lands for a longer term than three years can be created without writing & every lease or grant for for a longer term & not written operates only as a lease at will - tho now as a tenancy from year to year. 2 Bl 295. 30 b Rob. Ch. Ca. 240 1 Ba 72.

The deed must be written before the sealing & delivery for if one seal & deliver a blank paper with directions for filling it prop & this is afterwards done it will not be his deed as it takes effect from delivery & as delivered. 4 Cru 26 Shep. 54 Perk § 118

The consideration deems in a deed is given to explanation by parol 16 Cond 4 Ch. 8 Cl 204

A mere misstatement of the consideration will not vitiate a contract. the. a false statement in some cases may 10 C.E. Ch 444 Mit Beatty v Guce 2 Sch & Lef. 504. Drewyatt v Eustace 1 Mollon 334

If a conveyance purports on its face to be for a valuable consid.n it cannot be supported on the ground of natural love & affection 3. C. E. Ch 81. 2 Dow 274 Tredgman v Green 2 Ves Jun. 62. 2 P.W. 204

[illegible] permanent. 4 Cruise 1 Tit 3

delivery & is delivered 4 Cru. 26 Shep. 54 Peck p 118

The subject matter must be legally set forth tho it is not indispensable that the diffn. parts should be in the order prescribed. 2 B/2 Q/. 1 Inst 225. 4 Cru 32

The formal or orderly parts are eight – The Premises, containing the names of the parties & their additions – The necessary Recitals if any – The Consideration – The Description of the thing granted & the Exception if any – i.e. all that precedes the habendum 2 B/2 Q/B 4 Cru 33.

The omission of grantee's name in the premises does not vitiate the deed if the name be in the Habendum & in such case a wrong name in the former may be rejected as surplusage 3 Bart. 1 B. 1 Inst. 7. Shep F Cll. 41 4 Cru 419.

So where the grantor's name was omitted in the operative part of the grant but the consideration was expressed to have been paid to him – the deed was holden to be good – Ex. but it was said that in consideration be paid to the d. C. at the Lancewinder 4 Cru 419 Sal 341 10 Mod 40.

And if the grant is to C. Earl of B when his name is C the grant will be good – for there can be but one person who can have that dignity – so no danger of uncertainty – & in gen. a mere clerical mistake will not avoid a deed but may be explained C's mistake of a figure in the recital. 4 Cru. 34 419. 1 Inst. 3 4 B.R. 165 Sal. 341 10 Mod 40

The wife of C. without her christian name is a suffn. description of the grantee – So if a wrong one is given her she being described the wife of C is suffn. – for utile per inutile &c. 4 Cru 35 1 Inst 3

But in ordinary cases a grant by ones christian or surname only is void for uncertainty 4 Co 36 1 Inst 3 –

A name acquired by reputation is a sufficient designation of a person – a baptismal designed by the name by which he is usually known so a person may be described without either of his names as a grant to the first son of (4 Co 30 1 Inst. 3.28) For the rule as to the exceptions in Co Litt 4 Co 44 Ld Raymond 77. Co 2 b

Habendum & tenendum

The office of the inst is to designate the quantity of interest conveyed tho this may be done in the premises. 2 B 298 4 Co 44 1 Ins 302

When the quantity of interest is expressed in the premises it may be enlarged restrained or qualified in the habendum – As a grant to A & the heirs of his body – habendum to his heirs forever he takes an estate tail with a fee simple expectant (2 B 298 1 Inst 21 2 Roll R 19.23 Co 4 b)

The rule is said to be the same if the grant were to A & his heirs forever habendum to him & the heirs of his body (3 B 208 Co 4 b 2 Roll R 19.23) so held – 8 Co 154 1 Inst 21. that he takes a fee tail only & not a fee simple expectant. Doe qu –

Qu. rule that generality of expression in the designation part may be restrained by the habendum. Cowper. 9. 8 Co 154.

But the habendum if totally or contradictory to the premises is void for in deed if two clauses are inconsistent the first must govern – As a grant to A & his heirs, habendum to him for life – the habendum is void – for the inheritance is before conveyed & cannot be thus divested. (2 B 298 1 Ins 302

Where a particular description of the premises is certain a subsequent clause which if it stood by itself would enlarge the grant will have no operation 11. Peck 212. Cp. and all other words of grants in St. Louis Q.

Under the word "appurtenances" according to its legal sense an easement that has become extinct by reason of ownership or otherwise does not pass 1 Bulst. Cy. Moore 467 1 Bl P. 371. If grantor wishes to convey or create such right he must do it by express words only the terms "therewith used & enjoyed" 27 6 L 192

3 Wend. 101
6 Cuiv — t.t. 38
4 de 430 434

If one grant lands bounding on a highway the grantee takes to the middle of the highway but if there is no highway there altho does indeed the grantee will take only to the line of the supposed highway 1 Mund 270 tho the grantee will have a perpetual right of way over the space called the "highway" incl in the grant see 2 Zeber 363. 15 Ves 447 1 Burr 258 2 Ellis 127 Cro 456 1 Pick. 122. 1 Ct. 115 Gouldy & R. 31 incl 11 Pick 213 if by the terms of the conveyance the road is plainly excluded it is equivalent to an express declar. that it shall not pass & the fee of the road cannot pass as appurtenant to the adjoining land yet a right of way may pass as an appurtenant

is before conveyed & cannot be thus deserted. (21 Pl 293 13 Ves 302

Shep 88 Hard 94 1 Vern 39 1 Brut. 299. 2 Co 28 8 Co 4 Cru. 433 - Plowd 15) & for the other rules as to the operation of the habendum vid 4 Cru 431.7.

The tenendum was formerly used to express the tenure by which the estate was to be holden - It is now of no use - all freehold tenures being turned into free & common socage by 29 Car 2. 2 Bl 299. 4 Cru. 9. 47

The Reddendum expresses the terms if any on which the grant is made - by rendering the yearly rent &c. 2 Bl 299. Plowd 13 8 Co 71. 4 Cru 47 Shep. 80

The Condition if any. 2 Bl. 299.

The Warranty by which grantor for himself & heirs warrants the estate to grantee - in this case if grantee is evicted grantor is bound to give him lands of equal value & this he may be alleged to do either upon voucher of grantee or by writ of warrantia charta. 2 Bl 300 4 Cru. 49 1 Brut. 365.

For the difference between lineal & collateral warranty vid. 2 Bl 300. Litt. 143 1 Brut 174 384 1 Co 1.

Warranty may be express or implied. Co by the word "dedi" on a feoffment in fee under the ancient laws. 4 Cru 49 1 Brut 384 2 Bl 300 1 Co 365.

In modern practice warranties are declined being supplied by covenants. 2 Bl 304 Bac Cod. 2.4 John 11.

Deeds

Covenants are agreements by which either of the parties stipulate something in favor of the other. As that grantor has a right to convey - that grantee shall quietly enjoy - that grantee will pay the rent - or repair &c 2 Bl. 304 4 Burr 1 Pl. Cond. 138.

The usual cov.ts in Co. conveyances (except by quit claim) are two - That grantor is well seized & has good right to convey - 2 To warrant & defend the title against all claims. Kirby 1.

The principal difference between a warranty & a cov.t is that the former binds the grantor & as the case may be his heirs to give other lands in case grantee is evicted - but does not bind his Ex.rs. A Cov.t entitles grantee to a recompense in damages only & always binds the Ex.rs & not the heir unless mentioned. 2 Bl 304. Cun 4 Cru 419 30 Lb 1 Ves. 511 1 Dut 378 Bac Cov.ts. G in L 143 &c -

If the land conveyed is described by meets & bounds & answers that description grantor is not liable on his cov.t tho it fall short of the quantity mentioned in the deed. Ex. B. case bounded &c containing 60 acres - The description by meets & bounds governs unless there is a special cov.t as to the quantity. 1 Root. 328. 2 252 1 Ro 505 2 Mc. N 381.

The rule is the same if the deed refers or refer for the description to another deed or to a lease containing a description like the above. 2 Root. 252 1 Caines R 193.

Where the distances as to length of line do not correspond with the bounds or monuments the latter govern - by running

If one by quit claim convey land to which he has no title & afterwards acquire title he is not estopped by his prior deed 14 John 194 Co Lit f. 246 265b Sem if he had conveyd by deed of warranty - to avoid circuity of action 1 Cowen 616 But if after he acquires a title his vendee lacies his est upon it he is not estopped by the deed for he is not a party to it. His title is not derived from it. he relies upon no act of the grantee subsequent to its est to give validity to his title. in fact the title was in grantee at the time but he was estopd from asserting it 4 Mand 622

If one agrees to convey by quit claim such agreement has reference to the title as it is at the time of the agreement - but to a title subsequently acquired 1 Cowen 733.

The covenants in a deed of same event do not operate as an estopple against her or those claiming under her

15 John 471 3 Paige 473

2 do 40

In the lines of a deed that which is most material & certain shall control that which is less so - Ex. a river a spring or even a marked tree shall control both course & distance 7 Wheat. 10 6 do 582 1 Cranch 612 8 Mund 183 1 Payne 494 3 Ally 355 15 John 471 14 do 449 6 Cranch 281 5 do 371 7 do 723 4 Wheat 723

x "Containing so many acres, more or less" are words of description 2 Johns B 37 - that is where the land sold is described by metes & bounds.

100 rods to a heap of stones & the distance proves to be greater or less — Resolved several times by S.C. (qu. whether action for fraud lie in these cases if grantor lied intentionally, deceived grantee? however it not been answer to the action that grantee might have insisted on a cont. in the deed as to the quantity? The fraction has been sustained see id. 2 Day 128.

But if the description is by quantity without metes and bounds grantor is liable in case of a deficiency Sent. by Grant of 100 acres called B close 1 Ver. 305 —

Semble in civ if the description in the last case is qualified by the words "more or less" the quantity is then supposed to be inserted by way of estimation. 1 Ver 305

But when the description is by metes & bounds the words "more or less" have no operation (Sent) the description by metes governs. 1 Sug. v. 188 —

The Conclusion mentions the date & exn. of the deed — The date may come in either by insertion in the conclusion or by reference to a day before mentioned — In strictness the date is no part of the deed itself but merely a memorandum of the time when executed — Formerly deeds were not dated — dates became customary in the time of Q. Eliz. 4 Co. 33. 99. pl. Dist. 6 Co. 43 4 Bac 337 Yelv. 193 2 Bl 304 Co. Lit.

But a date is not even necessary & when inserted is only prima facie evidence of the time of exn. — Civ. there is an impossible or wrong date — the time of exn. may be proved by parol. 2 Co. 34 Thes. 72 2 Co. 43 2 Bl 304 Cro. 28 Sal 4 Bac.

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If two deeds bear one date & manifestly contain but one agreement that which last supports the clear intention of the parties shall be presumed to have been first executed. 4 Bac. 34 Burr. 1066.

Reading is necessary if either party desire it & if not done it is as to him void. 2 Bl 304 4 Bac 27 Moor 184 Shep 70.

If he is able he should read it himself - if not another should read it for him - if he does not request it to be read he is bound by it tho not read. 2 Bl 304 2 Co 32 1 Bac 306 4 Bac 27 4 Co 27 Moor 184.

If it is ambiguous it will be void (at least as to the part ambiguous) unless it is so readily collection between him & the reader one purpose to defeat it in which case it will bind the fraudulent party. 2 Bl 304 4 Bac 27 2 Co 9 1 Bac 306 Shep 70

Sealing is necessary to a deed at C.L. & by St Frauds signing also in many cases - 2 Bl 305 2 Wils 26 4 Bac 27. Shep 57. 60

So sealing necessary in C.L. 1 Bac. 307.

Signing was not necessary at C.L & accordingly was not in use (2 Bl 305 Shep. 60) Origin of of sealing 2 Bl 305.

But signing is necessary not only by St 29 - but by St Frauds -

One may appoint another his Attorney to execute a deed for him but it must be executed in the name of the principal. Stiv 705 4 Bac 28 1 Roll 330 501 Moor 91 9 Co 70 Ld. Raym 1418 Bl Rep 11 2 Bd 408 Ey. "Only by his Attorney" Also no particular form is necessary 2 Ba Ab 142

A bona fide purchaser from a land subject to an unregistered mortgage has with held it & the the mortgage be afterwards rescinded a subsequent purchaser is not affected by that or any other notice of Conow 362.

Holden in 7 Mass. 191. that where a bill bond was executed & delivd to the officer it was competent to show by parol that the delivery was not absolute & that the obligor was not to be bound according to the tenor of the bond. the Court say "the mere manual tradition of "a deed by grantor to grantee & nothing else is ab facie "facie evidence of a legal delivery but not conclusive "the legal effect ~~may~~ of the act may be explained so that this "is not impugning the doctrine applicable to answers but "only allowing the party to contest the delivery"

Deeds

If the Attorney executes the deed otherwise than in the principal's name he binds himself & not the principal. Co. B 25.5b. 76 Stiles 95 Gilb 53 1 Bl R 181 Co 75.

But an Attorney or Agent cannot bind his principal nor one partner his Co-partner by deed without authority given by deed - for he cannot by act of another be affected by way of estoppel unless he has subjected himself to it by matter of estoppel Bent. 1 Brut. 32 7 Bl R 205 4 313 Comyn Attorney C 15.

The rule however seems to contemplate an exception in the absence of the principal - for it has been determined that if one executes a deed for himself & another in the presence & by the direction of another it will bind both 4 Bl R 313 Co 6 at 218 1 Bro 306) being a person physically incapable of affixing a seal would not be bound by deed.

If several executors are grantors & one only seals it is his sole deed. Shep 1 136 c. 32.

Every deed to be effective must be delivered. Hence the form of attestation sealed & delivered. 2 Bl 306 4 Cru. 28.

It takes effect from delivery whatever the date may be. Hence if a deed is made & dated during grantor's minority & sealed & delivered after full age it will bind him. 2 Bl 307 Plowd 309. 4 Cru. 28 2 Co 1 Shep 58. 72. 2 32. 2 Solm & 230 L^d 230

And the attesting person reads the deed yet if the party delivers it he is bound - for he adopts the reading & signing - but if delivered before reading it is no deed. 2 Bl 307 4 Cru. 28 Perkins 130 Shep. 38.

4 March 318
Dorchester 187.

The act of delivery without words may be effectual - So the delivery may be by words only without any act of grantor - As the deed being signed & sealed - grantor says "There is my deed take it" Shep. 58 9 Co 137 Cro. 102 Litt 36. 49 Cro E 122 330 4 Cru 28 Com Dig Bait A 3 - 1 Johns Ch 250

But if grantee takes it without grantor's express direction or consent or without delivery (as taking it from a table where it is laid) there is no legal delivery unless it is found that the deed was laid there with the intent that grantee should take it. Shep. 58 Cro. 93 1 Salk. 140.

A presumption of delivery arises from the peculiar form of the deed or of the hand & in Ex. from the acknowledgment. A deed may be delivered to the party in person or to any one having authority to receive it or to any stranger in behalf of & for grantee's use - Shep. 57 - 4 Cru. 28 9 Co 137 Perk. 137.

A deed cannot be delivered to any effect more than once - i.e. one delivery only can be operative as a delivery for if the first delivery has any effect the second will be void - Shep. 60 Perk. 154 4 Cru. 29

But if the first delivery is merely void the second may be effectual - As Deed delivered by a feme covert & after the husband's death delivered anew the second delivery will be good. Shep. 60 Perk. 154 Cowp 201 4 Cru. 29 3 Burr. 1803

If a deed once good becomes void by loss of the seal or second sealing & delivery will make it good - But if an Infant or one under duress delivers a deed & after full age or restoration delivers

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again the second delivery is void — for in them case the first is only voidable. Shep 50. Pinch 154 Roll Abr. 4 Com 29. 2 Co 119.

Is not the amount of the last rule merely this that the second delivery is void merely as a delivery tho operative as a confirmation of the deed ab initio?

A delivery may be absolute or conditional. Shep 58. 1 Com 29 1 Bro. 35 2 B 317

When delivered to grantee or some other person to be delivered over without condition the delivery is absolute — But if delivered to a stranger to be delivered over on some cond^n or writing may the delivery is conditional 2 B 317 4 Com 29 1 Brot 35.

In the last case tho the writing till delivered over or rather till the cond^n is performed is called an escrow — it is not the deed of the grantor till that time — It seems agreed that a writing cannot be delivered as an Escrow to the grantee — If delivered to him the delivery is absolute for grantor is not permitted to aver against his own delivery. Shep 59 Co. E 520 884 9 Co 137. 4 Co 80. 1 Brot 35 11 Mod 246 Noy 119. 251 Yelled 218 11 Mod 84. Contra — Co E 835 Moor 697 Comyns Dig. Ab. 3 —

A bond or note which int. is considered as a deed) delivered to Executors to be delivered over to the prevailing party is an escrow 2 Co. 210 307 —

If grantor on delivering a writing to a stranger to be delivered over on cond^n says. "I deliver this as my deed to be delivered over on cond^n" he it it takes effect absolutely the latter words being repugnant to the former — the title then rests from the time of the first delivery — But in case of necessity (where there exists a disability at the second delivery ~~[illegible]~~ and not at the first indenture at the first) the deed shall take effect

The propn of the deed by cestui que trust is in a legal view the propn of the trustee 17 Johns 577 –

Mich 1877 for in neither case is there any complete common law name

[illegible] as the [illegible] the deed shall take effect

& the title rest by relation to the first delivery or not as the case may require - the doctrine of relation shall be applied if it will give effect to the deed & will be rejected if the deed will be defeated by it. Shep. T. 360 35

1. Where the doctrine of relation will give effect to the deed. If a feme sole delivers a writing as an escrow & then marries & on performance of the cond.ns the deed is delivered over during coverture it takes effect by relation to the first delivery & becomes her deed from that time - it remains valid at law - but it would fail of effect - So if one delivers as an escrow & dies & on performance of the cond.ns the deed is delivered over it takes effect by relation. 360 35 - Hy. 423 Shep. 72 Co. 2. 447.

Lord in such cases if the cond.ns is performed & the deed not delivered over it will take effect from the first delivery by relation the inchoate delivery being consummated by the performance of the cond.ns. 5 Co 34. Shep. 54.

If one delivers a writing as an escrow to be delivered to grantee on grantor's death it takes effect on his death by relation - So if one of sound mind makes a power & a letter of Att.y to a third person to make livery upon it & then becomes non compos the livery will be good by relation to the deed - for it is a consummating act & such acts operate by relation to the original act - 1 Roll. 460 2 Bac. 883 4 Bac. 66 1 Burr. 310 Co. 2. 447 Shep. 72 Co. 5. 12 1 Co. 99 Hob. 1 5 Ad. Doug. 269.

But if one make a power of Att.y to another to execute a deed of conveyance or to make livery upon a deed of feoffment & die before the power is executed the exn of the deed in the one case by the Att.y & the livery in the last will be void Litt. p. 66 1 Co. Pash. p. 188 1 Burr. 52 2 Roll. 9 Hob. 270 for in neither case is there any complete common law name

to become operative upon performance of a condn. since a subscqt. act of the Attyn. is necessary in both cases to create a title. But a power of Attyn. being a bare authority, is in law regularly countermanded by the death of him who made it & therefore the subscqt. act of the Attyn. is void. Litt. p. bb 1 Brit. 52 2 Roll Q.

2d. If the application of relation could defeat the case where it is first delivered as an escrow the title will act from the first delivery only (Hob. p. 72) Thus if a person disposed make a lease to one out of posn. & delivers it to a stranger to be delivered to lessee on the lessee's death it will take effect only from the second delivery - for if the doctrine of relation were applied to it it would be void. Cro. J. 147 3 Co. bb 1 Brit. 48. 3 Bulst. 215. Hob. p. 3 Q.

This rule cannot operate so as to violate the privilege of a person who is under a legal disability at the time of the first delivery - Thus if an infant be make a deed & deliver it to a stranger to be delivered to grantee & it is delivered even after the disability is removed it does not bind. 3 Co. 35 Cro. J. 105 - Cro. J. 67.

A deed never takes effect by relation so as to affect or be affected by collateral acts - i.e. it operates retrospectively (Brit.) when it does so at all only as to the purpose of vesting the right or title - ex mere gratia. Hob. p. 3 3 Co. 35 2 Roll 400 Pordy. p. 125 -

Thus if a bond is delivered as an escrow & is delivered over to obligee under circumstances which give it effect by relation a release between the first & second delivery does not discharge it - for it had not become the obligee's deed at the time of the release - nor but can the relative operation make one in the proper by relation of a grantee remainder in posn. between the first & second delivery be

When a lease & mortgage were delivered to a third person to be kept by him during the pleasure of the parties and subject to their further order they were held to be mere deposits & not escrows 2 Paige 385

Where ground lines are established by competent authority on actual survey & marked they should govern over similar lines marked or delineated on paper & filed in a public office & when they are afterwards spoken of as lots or roads the practical lot & road is to be intended 16 Wend 677. 17 Johns Rep. 4 Mass 110

If one puts down a deed upon a table intending the other shall take it there is a suff. delivery 11 G 2 p 38 & if the witns sealed & are mentioned in it the presumption is that it was sealed before delivery tho the witness has no recollection of the fact unless it appear not to have been sealed —

4 Rand 485. b. if both parties be present & the usual formalities of exn are used & the contract is to all appearance consummated without any condition or qualification annexed it is a complete & valid deed altho' left in custody of the grantor 1 Johns Ch 240 17 Johns R 548 577 5 Bar & Cr 671. 15 Mass 547 —

It is essential to the delivery of a deed that it be accepted by the grantee 15 Mass 658 2 Ala 307 6 Conn 617. may be delivered to a stranger for the benefit of grantee 15 Mass 662 2 Ala 447 9 Ala 307 13 Johns 285 4 Day 66

cannot after the second delivery be liable for this posit. definition of Sec. nor can works an injury or make that tortious which was before lawful. 3 Co 3b Hob 73 1 Mod 150 2 Roll 502 Hob 7. Cont.

A deed delivered to be for the use of B. & to be delivered over without cond. to B is deemed good till B dissents - for he is presumed to assent till the contrary appears. 2 Root 26 4 Bac 395 2 Leon 233 3 Co 20 1 Sid 165 1 Lev 8/138.

If a deed be delivered to a stranger to be delivered over & the grantee on tender refuse to accept it he can never after claim it for the first delivery has lost its force & grantor may plead non est factum. 5 Co 119 3 2b Post. N. 2b0 Cro 8 54 Hob 30

It is doubted whether grantor can plead non est factum to the deed in the last case - but there seems to be no suff. reason to prevent it. 3 Co 2b.

Attestation

This is the ex. of the instrument in the presence of witnesses - at C.L. it is no essential part of the deed but mere evidence of its authenticity. 2 Bl. 307 1 Co 31.

Formerly the witnesses did not actually subscribe their names to it tho' the practice is now otherwise & has been in Eng. since the reign of H. 8. tho it is not now in Eng. necessary. 2 Bl 307 1 Mod 78

In C. all grants & mortgages of lands & houses must be attested by two witnesses who must subscribe their names on marks - Leases for life or for any time exceeding one year must be attested or they will be valid only against the grantor & his heirs. St. 153 4 1 Rev. 30b

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Certain other requisites unknown to the C.L. are wanting in Eq. as

Acknowledgement

All grants & mortgages of licences & lands must be acknowledged before some assistant or Justice of the Peace or they are incomplete. The officer exercising the power of Justice of the peace was before the year 1798. called a Commissioner. Now leases for life or any term exceeding one year are void against Lessor & his heirs only unless so acknowledged. St. 654 1 Rev. 307. 2

If the grantor after executing a deed refuses or neglect to acknowledge it the grantee may enter a caution with the recorder of the town which secures the interest to the grantee till "legal trial" held (qu what sort of legal trial is meant by the St.) & the judgt. if in favor of the grantee delivered to the recorder will authorize him to record the grant & a copy of the grant authenticated as the St. requires shall be as effectual against grantor & his heirs only, & recorded at length in the records of the town. St. 653 1 Rev 307.

Recording

By our St. a deed of sale or mortgage of licences or lands is effectual in law against grantor & his heirs only unless recorded at length in the records of the town. St. 653 1 Rev 307. 2. Ct. Reg 2

The town clerk on the receipt of a deed is to note the day & the record is to be of the same day. The object of the St. being to give notice to third persons & reduce the title to a certainty. The title as against third persons being in gent. effectual from the date of the record so that as between the diff. purchasers of the same subject the deed first received & noted by the Clerk will prima facie hold the title. St. 654 1 Rev 307 1 Root. 51. 8 Johns R. 137

a. If no other person can authenticate it. 3 Burr 422.

A deed proved to be lost is no evidence until it is proved to have been subscribed by two witnesses & acknowledged for by our St. it is necessary that it have these requisites before it is complete. B. hampstead vs Farmington S.C. Aug. 1818

If husb. & wife join in a deed & the wife does not acknowledge it she is not bound 10 Johns 435. 16 ao 110 - 20 ao 303 -

When a deed has been acknowledg. if such act be essential to its validity it has relation back to the time of its exn. Wood v Owings ao 1 Bacon 239 1 Wash. R 525 -

An unrecorded deed is admissible in evidence in a controversy between two towns for the purpose of ascertaining a paupers settm. S.C. Dec. term 1818 Barkhampstead vs Farmington -

Bill of the pers being lodged for record is presumed from being

a deed executing a power generally relates back to the instrument creating the power so as to take effect from the original deed yet this is an fiction for the encouragement of justice & is not to be applied to the injury of a stranger by defeating his lawful intervening rights 20 John 537 18 ao 299 4 do 234 12 do 144 3 Co 25. 29a 2 Vent 200 2 Ro. 78 2 Ro. 610 1 Ch 570 13 Co Merrill case — 1 John Ch 297 —

Where equities are equal & neither has the legal title the elder equity shall prevail nor shall the younger equity be protected by acquisition of the legal title after notice actual or constructive of the prior equity 3 PW 307 1 Atk 384 therefore where one claiming the prior equity is in the actual posn of the estate & of this fact the purchaser has notice it is suff to put him on enquiry as to the actual rights of such person & is good constructive notice of such rights 5 John Ch 33 1 Mont. 282 Dom. R 80 na 3 Paige 437 — 8 Rand 213 whether his rights appear of record or not L 10 by w

But this R. does not hold against a prior grantee if he has used due diligence to procure his deed recorded - for he is always allowed a reasonable time to do this. 1 Rev 308 1 Rev 500. 388 - 2 239

But if the prior grantee has delayed an unreasonable time or subsequ. purchaser or attaching creditor first recording will hold against him. 1 Rev 308 336 1 Rev 388 2 287. 1 qu. 6. this correct at least in eq. if the subsequ. purchaser had no actual notice of the first deed. 8 John. 137.

If a prior grantee having lodged
What is a reasonable time is not settled by any definite rule but must be determined by the circumstances of the case. 1 Rev. 208 1 Rev 389

If a prior grantee having lodged his deed in reason prevents it from being recorded at length the subsequ. recording of it will not have relation to the time of lodging it as against an intermediate purchaser where deed is first recorded. 1 Rev. 61

If a prior deed be lodged to be recorded before a subsequ. one the latter after a lapse of reasonable time the prior grantee (Sent.) will hold at law - qu - in eq. - for if the first purchaser had not been guilty of neglect the last would have had the means of notice - Suppose the prior deed (being reasonably lodged) to be recorded the latter after a lapse of reasonable time & after the subsequ. one is lodged & noted to the 1 the subsequ. purchaser (Sent.) will hold clear at law according to the analogy of other cases decided here - for he is entitled to the benefit of relation which the other is not - Sent - 1 Rev 61. 81. Nodgu -

But if the prior being lodged for record is prevented from having

recorded by the subsequent purchaser or by grantor it will when recorded hold against the intermediate purchaser tho his deed be first recorded — so if the record is delayed by the negligence of the Clerk — for in both cases the first grantee is in no default having done all that the law required of him to perfect his title. 1 Root 11. 500. 2 Ch. 239.

It is said to have been determined in our Court, that a subsequent deed first recorded shall hold to the exclusion of a prior one tho the subsequent purchaser had actual notice of the first deed if the recording the first has been unnecessarily delayed by the first grantee. / 1 Root 11. 81. Ver 209. / Same rule adopted in Eng. in the construction of the register act 1 Bent 23 1 Ves 11 Cons. 712

In Eng. it is settled that if the party first registering knew of the prior unregistered deed at the time of purchasing the prior grantee shall hold in Eq. — the subsequent purchaser being considered as a trustee for the former — 1 Bent. 23 1 Ves 11 Cons. 712 1 Eq C. 358 2 Atk. 375 3d. 64 b — Cmp. 340. 8 Solm 137. 9d. 163 10d. 457. 466 18 Solm 6d 298.

The rule would be the same here 1 Bent. 1 qu. Does the delay of the prior grantee make any difference in Eq. where the subsequent purchaser has actual notice? Is not the true principle this — that a subsequent purchaser tho he records first shall not hold unless the prior one has been guilty of neglect nor even then if he has had actual notice? 6 Pheud. 213. one being in poss. under an unrecorded deed — left to pick the other in equity —

An attaching creditor may perhaps stand on better ground he not being a volunteer — the property as between him & the first purchaser may perhaps be considered as tabula in naufragio. 1 Pick 63 Bent. 310 2 Atk. 33 2 Dem. 599 Pow. M. 149 95 214. 28

Where the grantor claiming the same land do not derive their title from the same grantor the last purchaser cannot object that the other deed was not on record when he purchased 11 Pick 193.

If the sum specified in a mortgage by mistake be recorded for less than specified in the deed it is notice no further than the sum specified on the record - of the remedy of the grantee is against the clerk making the mistake 1 Johns Ch 299

Implied notice not suff^t to set aside a subsequ^t registered deed 8 Johns 137.

An unauthorized registry of a mortgage or one registered without previous legal proof or without acknowledgment is no notice 1 Johns Ch 300. Lingdon L.R. 527 1 Sch. & Lef 157 2 Binn 40 -

A purchaser on valuable consid.n cannot be set up, pleading to the conveyance to his grantor the land had been conveyed to another by deed which was recorded before the last purchase tho his grantors deed was first recorded

15 Wend 588

The want or failure of a consider.n cannot be set up at law to impeach a specialty – 2 Johns R 177. 179 n

20 do 130 –

After a deed has been executed it may be altered in a material point by consent of the parties without affecting its validity 4 Johns R 84

The alteration of a deed conveying an estate in lands thro done fraudulently does not divest such estate if the estate be of such a nature that it may exist without deed 8 Cowen 71 7 Wend 366

15 Johns 297

Deeds

If a town Clerk having received a deed for record delivers it back without recording it even at the request of both parties he is liable to any party injured by the act – Cr. Creditors of the grantee who may have purchased attached it or purchasers under him. 2 Rock. 85

So it is his duty to keep the deed till recorded on file. If he conceals it he is liable to any one injured by the concealment. Sands.

Was destroyed

If an instrument wants any of the requisite, of a deed it is evidence a deed – 2 B 1 308.

So deed may be destroyed or made void by matter of fact fraud –

B. By Mistake – or any alteration in a material point 2 B 1 308 11 Co 27.

But them of mistake or the delivery are not inadmissible if an memorandum be made of them at the time of ex. Sometimes destroy the deed – /not so here/ 2 B 1 308 4 Cru 26 Hesp 5 t.

An alteration by grantee after delivery destroys the deed whether it be in a material or immaterial point – & tho the deed contains several distinct & absolute covts. & is altered as one of them only the whole be void – said – 11 Co 27 2 Roll 29 Sands 234 Hesp 71.

But an alteration by a stranger does not destroy the deed unless in a material point 11 Co 27. 2 Roll 29 2 Burr 1. 24 Co & 62 b

When the deed is thus destroyed no set fraud may be pleaded to it & if a stranger thus destroys it he is liable in case. 5 Co 119 11 Co 27 Co & 62 b

Deeds

But may a grantee in such case, hold an under a deed destroyed by time or accident?

1 Breaking off or destroying the seal. 2 Bl 308 & Co 23.

If two are jointly bound in a bond & the seal of one only is broken off it becomes void as to both - tho in Eq. Sent. it may still be enforced as an agreement or perhaps by way of relief against accident - Semble if they are severally bound 11 Co 28 1 Rod. R 40 2 Bulst. 248 Dart. Pl. 259 Cro E 546 2 Saw 28 1 Saud. 14 b.

2. By delivering up the deed to be cancelled. 2 Bl. 308.

4th By the subsq. disagreement of those whose concurrence is necessary, in a husband to his wife's purchase &c. 2 Bl 309 Shep. 68

5th By the judgement or decree of a court of justice - &c. where the deed is obtained by fraud &c. & set aside in Eq. 2 Bl. 309 1 Dem. 348 2 Rood. 143. 63 -

For the diff. kinds of deeds &c. 2 Bl 309 to 43 -

Construction

Deeds are to be construed as near the apparent intention of the parties as the rules of law will permit. 11 Co 113 1 Saud. 36 Plowd. 154. 60 3 Leth. 13 b - 13 R 3 b 7 Eng.

Tho the grammar or construction of a deed. 11 Co 41 b Shep. 87 Plowd. 134 574. 70 9 Co 48

The construction should be upon the whole deed & not on any one part & so must if possible that every part may stand & take effect. 11 Co 41 b Shep - 87 Plowd 160 Litt p. 283 - 1 Bolem 6 94.

No person but a party to a deed or one claiming under him can impeach a deed in the ground offered 20 Johns 478

If A. convey land to B & afterwards A & B connect & deliver up their respective deeds the real estate will pass by the cancellation the personal property originally intended, never elevated or not is in A. 2 Johns R 84. contra Ct R

1 Johns C 399
3 Johns R 388

"Deed drawn in a form in which by law it cannot operate

Even where the grant is from the State - the most favorable construction is taken in favor of grantee } 8 Johns R 394 } 8 " 375
3 Cranch R 293

No deed shall ever be construed void if by any construction it can be made good 2 Saund 97 n 1
Hob 277 Sh. J 82. 83

x The words are to be taken most strongly against the grantor or party whose wrongdoing are & most favorably to the grantee. Eg. Land granted to A without mentioning the quantity of interest - A takes for his own life - So if two clauses be repugnant the first is to operate & the latter rejected unless there is a special reason to the contrary. 1 Cru 416 Shep 88 Ward 94 1 Dern. 30. 1 Inst. 299.

Words of gent. release when standing alone are to be construed generally but if preceded by a particular recital they then are restrained by the recital. 4 Cru 417 Ba. Release B. Ward 74, 94 Ibid. 141 Pow. 390 3. Ves 277 3 Ecos 369. Eq 250 b

Words which are repugnant to the gent. terms of the deed & the evident intention are to be rejected. 1 Cru 418 2 Ath. 135 6 Bro C 351.

When any subject is granted all the means necessary to the enjoyment of it pass with it - Eg. A grants a piece of ground in the middle of his field to B - His implicitly gives B a right of way to it - So if A grants trees growing on his land grantee has a right of entering on the land to cut & carry them away - 2 Bl 35. Finch 63 1 Inst 56 - Shep 89 11 Co 52 Vid 13 Ath 559.

Where the grant of the principal or subject matter carries with it the incident or necessary without the words "with the appurtenances" - As a grant of a reversion the rent passes with it. Shep 89 Litt. p 522 529. 4 Co. 86 2 Bl 196 1 Inst 143 — 17 Ath 570

So by the grant of a house the ways belonging to it pass with it So also by the grant of a mill the water necessary to the use of it will pass. Shep 89

A Deed drawn in a form in which by law it cannot operate

Deeds

or take effect may operate as a deed in another form for the purpose of effecting the intention — thus a deed in the form of a grant between Joint tenants may operate as a Release — If made by the particular tenant to the remainder man as a Surrender so also a deed by reversal of a thing in which one of them has the sole interest is in legal effect his sole deed. Shep. 79 2 Co 35 Comp 600 2 Wils. 75 1 Burr. 301 Cro. 420 Plowd 140 1 Vent 137 3 Leo 372 Parkes. 66 4 Mk 472 1 H. Bl 614. 2 Saund 47 n1 Cantk 307

If the terms of a deed are so uncertain that the intention cannot be discovered it has no effect — As a grant to Lo on Ls. Hob 313. 2 Lev. 103

When a deed is said in fact is void in toto & when not said. Shep. 71 11 Co 27. Cro 27

Deeds

If a deed contain several covenants some of which are lawful & others not the former are good & the latter not. / 11 Co 27 Shep 74 / qu. if the others are made void by H. 2 Wils 251 Hob. 14 Plow. C 199.

So if there are several distinct clauses some of which are truly read to the party & others not the deed is good as to the former & void as to the latter. 11 Co 27. Shep 70.

But these cannot apply Semb. if the lawful & unlawful covts. in the one case or the clause truly read & not truly read in the other constitute mutual considerations or are connected with & dependant upon each other. Shep. 70

If two distinct obligations are written on one paper & one of them is read truly & the paper is sealed & delivered it is the deed of the

John H. Russell.
Salisbury, Conn. 184.

3 Dev 291
4 Ates 150
Sty 104
760 40
2 Rell 786

If one is in posn of law holding 2 titles one from the other land the law presumes he entered under his good one 6 Mod. 225 4 Mass. 619

A deed of bargain & sale founded on a pecuniary consideration to take effect in future is good 1 Johns Cas. 91. 11 Johns R 355 20 Ver 87 2 Bound 96 n 1

A reservation or exception in a deed in favor of a stranger is void - But may operate as a covenant to stand seized 20 Johns 87 3 Bound Ab. 66 Cook. 17a 7 Co 133 2 Blac 934. A & his wife conveyed to B a farm reserving to themselves the use of the premises during their natural lives. A. died - held that the deed could not operate as a reservation or exception to the wife who survived but was valid as a covenant to stand seized to the use of the grantor for his life & after his death to the use of the wife for her life 20 Johns 85. & technical or formal words not necessary to create such cov.

[illegible] proper is necessary [illegible] A. is the deed of the

Deeds

party as to one but not as to the other 11 Co 27 Roll 28 2 Co 3.9 Shep 70.

But if a deed is void as to part of the entire sum it is necessarily so in toto – As a bond for £20. dead as for 20/ 11 Co. 27 Shep 70 here the obligor is not bound to pay the £20 for want of a part – neither 20/ for that sum is not in the instrument.

If a conveyance is made to two one of them depart the share of the latter remains in the grantor. 2 Daz 395 Peak 192 204 2 Ba 143 –

A deed must be proved by a subscribing witness for the party shall not acknowledge it. 1 Lp 89 Ind Daz 216 7 Mo 267 1 Peak 20 4 Bart 53 2 Bos 85 Peak. & App. 29.

The riparian proprietor is prima facie the owner to the middle or thread of the stream adjoining his land - i.e. where the terms of his grant do not show that he is differently limited 4 Mill 373 Ex parte Commissioners of the Thames Conservancy 15 John 454 6 Cal R 471 3 Kent 432. 6 Mass 455 17 do 298

An attachment directs the officer to attach to the value of $100. which is done — judgt is rendered for $200. is the attachment a lien for more than $100.? 13 Mich 56. 5 do 78.

Ct 57. 65 74 requires the officer to make demand of the debtor at his usual place of abode. If a demand is made at the usual place of abode & the debtor has no opportunity to pay is there such a neglect on his part as to authorize a levy on land? 13 Ct 57

Executions

By St. 29. the law of exn. has become a common mode of acquiring title to lands & in this respect our law is widely diff. from the Eng. 1 Bro. 332.

By the C.L. the only exn. issued in personal actions against the party originally liable were the fieri facias, the levari facias & the capias satisfaciendum. 3 Co 11 2 Bl 414 2 Bac. Ex. 63.

On the fi. fa. only the goods & chattels, lots, real & personal can be taken in exn. & the property thus taken is to be sold by the Sheriff for the satisfaction of the judgment. 3 Bl 417 5 Co 111 1 Saund 290 2nd 304 Bac Ex. 63 Comyn.

On the levari fa. the Sheriff may take goods & the profits of lands growing on the land &c. he may also levy the debt out of the rents due to the debtor. 3 Bl 417 Finch L 471 Com Ex. 63 3 Co 11 2 Bac Ex. 64 Plowd 141 Comyn 470 2 Saund. 453.

On these exns. the whole personal estate of a deft. except necessary wearing apparel is liable to be taken - but on neither of them in the debtor's land be taken nor fixtures they being parcel of the land or freehold. 2 Bac 351 n Com Ex. 64 2 Co 13 3 Bl 418 1 Roll 890. / But note the distinctions in Ford. 388 & Bach. 38.

By the C.L. the writ of Capias under which the body is taken was allowed only in cases in which the injury for which it was committed with force except in case of the King. It was allowed in such cases on account of the breach of peace which was an offence. 3 Co 12 1 Saund 289 2 Bac 351 2 Saund 294 2 Leon 83 2 Bulst. 53.

Executions

Hence a C.D. if a subject recovered judg.t in an action sounding in contract or in any other action than quare vi et armis" he had a choice only of the two former exec.s except in actions against the bride 3 Co 12. et sup. 2 Ba 328 Pow. M. 404

By the Sts. 1 Ed. 1 25 Ed 3 § 22 & 8 the writ of Ca Sa was extended to actions by subjects not sounding in force 3 Co 12. 2 Bul 113 380 2 Bulst. 63 1 Bul 89 5 Co 88 but even now it cannot issue in all cases. Com. ex.n C.O. 3 Co 12.

By the C.D. the King might also have an ex.n against the land of his debtor - heirs of a subject - except in actions against an heir - 3 Co 12 Cro J. 130. Palm. 167. Plowd. 440 Com C. ex.n C.O. Pow M 404 2 Bul 18 7 Co 21 Hob 60 Com. 143 3 Ba 25 2 328 This rule was a consequence of the feudal restrictions upon alienations 2 B. 113 2 Ba 308

On a judg.t against an heir on his ancestor's obligation the Pl.ff might at C.L. have an ex.n against all the lands which the heir had by descent from his ancestor - this right was founded on the weight of the exc. - The heir was liable to the action but the goods & chattels belonged to the personal representatives & if judg.t might not be satisfied out of the lands the Pl.ff. to whom the land gave the right of recovery might be defeated of his action. But in this case the land was only extended to be taken by the creditor till the rents & profits should satisfy the debt the fee could not be taken. 3 Co 12 Plowd 440 Com ex.n C.2 Plead. 2 E.6.

Now by 13. Ed 1. a Pl.ff. having obtained judg.t may have an ex.n called an elegit which issues against the goods & chattels half the freehold estate of Def.t 2 Bl 160 3 B. 113 2 Bust 195 2 Ba 340.

When the Sheriff justifies under a fi. fac. he need not show it to be returnable Cowp 18. 10 East 73 8 Johns 53. Lenton 1 Salk 109 1 Ld Ra 532 Wilcox 17. See qw. in Ct where the St. requires the return of the exn & sent in the form of the exn Mesne process must be returnable-fieri need not be Foley v Reed qlt

Cooke,
for Demurrer.

A creditor of one tenant in common cannot take by extent a part of the land held in common by metes & bounds; but must spread his extent over the whole & take such an undivided proportion as will satisfy his debt – so if the debtor is tenant in common of two or more parcels of land held by distinct titles the creditor must take the whole of his right in one before he takes a portion in an other 2 Ca. & 243 13 Mich. 57

The St. exempting perishy from extent is in derogation of C.L. consequently the tools of a debtor exempted shall be construed such tools only such simple instruments as are used by hand 13 Mich 86

vestals
2 Grant 805

2 Ba 340.

Executions

Under this exn the goods & chattels are not sold but appraised and delivered to Pff. - if they are insufft. the lands are extended till the judgt. is satisfied or interest of Deftt. expires. 3 B 418 2 Ld 161 2 Ba 349 Com. exn C. 14

After this exn if the land is taken upon it / Deftt. body cannot be taken 3 B 419.

By 13 Ed 1 St 2 c 3 - upon the forfeiture of recognizance on St. Merchant & Staple all the lands as well as goods & body may be taken in exn - the lands in this case are extended as under an Elegit. 3 B 420 2 Ld 160 289 St. V. B. 131.

In C. there is but one species of exn in personal actions & that goes against the goods lands & body of Deftt. - If goods are seized on exn they are forthwith to be advertised for sale on the sign post of the township - & to be sold at public vendue at the end of 20 days - But the officer must make demand at Deftt. place of abode if auction his present before seizure / 2 Sw. 281 St. 280. 622 / & a sale before or after this time is illegal.

That money may be taken in exn vide 2 Shaw 166 3 Co 11 Doug 219 230 1 Root 210 2 Sw. 282 Hand. 48. 1 Root 1.

If personal property suffn. can be found the exn cannot lawfully be levied on land - but if suffn. personal property is not tendered off may at his election take the land or Deftt. body - he is not obliged to accept the land instead of the body & if the Sheriff mittimus creditor's direction takes the land when he might have taken personal property he becomes liable to creditor. 1 Sw. 333 83. P. 282 St. 282

Executions

Under our St the necessary apparel of Deft & his family necessary bedding tools arms implements of his household necessary for upholding life fire - necessary furniture / one Cow Sheep not exceeding ten & two swine are exempted from exn unless tendered by Deft. St. 280. 4 2 Bro. 282

If after the Sheriff has taken the body & before commitment suffn personal estate is tendered he is bound to release the body & take the property & it is said he may on the same tho the property is not tendered. 2 Bro. 284 via 1 Root 120 qu 124

If the Sheriff suffers the Deft to go at large on security that he shall be surrendered in the life of the exn he may take him again & commit him. 2 Root 133. qu 2 Bl R 176 2 Bro 240 1 Dall. 269

In Eng if the Sheriff be doubtful who owns the goods he may summon a jury to ascertain the fact & if he does not he takes or omits to take at his own risk - tho the inquisition of the Jury is no evidence for or against a third person claiming the goods 4 Bl R 633 48 2 Bl 437. 8 Burr. 29. Bl R 63

In Ct. he has no such power - here therefore if there be any reasonable ground to doubt Deft. ownership he is not bound to take the property 2 Bro. 283 in 1 Root 124

If Pff. in the exn present to the officer property which is not Deft & the officer is subjected for taking it the creditor is liable to him. 2 Bro 282 1 Bro C 178 Cro J 752.

If the officer does not take property suffn by a first levy he may make a second levy but if he levies on property insuffn & after wards can find no more non Deft. body he is liable to Pff. - but this rule

By H. Oct. 5th. 1817 there is a further exemption of 2 Cords wood. 2 Sows being 2 cwt. pork or beef. 200 lb. fish potatoes or turnips not exceeding 8 bushels. corn 20 lb. wool or flax & the cloth made therefrom being the property of any person whether a wife or family & the horse saddle & bridle of any person Rapinian a hangman of a value not exceeding £100. – This exemption is a personal privilege of which no one can take advantage except the owner 1 Cowen 114 How far is this law constitutional? 1 Swed 114 – T.C.C. 308. 309 quod vid – B. such law is good as to subsequent contracts its legality as to antecedent ones doubted –

If a Sh. with his own money pay the Pl. on an exn. & after wards levy the exn. out of Deft. property the Court will set it aside – 9 Johns R. 126

The Sheriff has not power to discharge an exn. even by returning it satisfied unless he proceeds & executes it in due course of law – if he takes Defts. negotiable note receipting it as payment in full & returns the exn. satisfied this will not operate as a discharge altho Deft. pay such note to one to whom Sheriff passed it – 1 Cowen 116 – Because Semb. the Sheriff being delegated with special authority provided him in the exn. he must pursue it or the creditor is not bound see also 9 Johns 263 where the officer gave debtor a receipt in full when no actual payment – vid Ex 308 309 –

But where the officer takes security for the debt in the regular course of the exn. it will be a satisfaction (13 Johns. 207) or if he levy & take a receipt for the goods tho the property seized be insufficient – provided the security taken be

suff. for the whole debt.

But the simple rent of keeping upon the goods with ex. suff. to satisfy it will discharge def. who may plead such keep in bar to an action of debt on the judg. 12 John 207. 2 Lev 1072 6 Mod. 290 4 Mod. 105 9 John 99 15 do 443 1 Brown 46.47 - 2 u - 241 - 7 Comm 21. 4 do 417.

Now is an ex. to issue where one deft is out of the State not sued with process & does not appear & judg. is rendered against the other who is served with process within our St.? Sed Qy. under a similar St. it must issue against both 5 Wh. 438

Where land in which the debtor had an estate for life only is appraised levied upon & set off as an estate in fee the creditor acquires all the interest the debtor had. 16 Pa 472.

pun on sure nor [illegible] is liable to Pf. - but this rule

presupposes that he might at first have found suff. property or Defts. body. 2 Bu. 282 1 Lev. 91. 2 Bu. 363

Decided in Mass. that goods attached by an officer cannot be attached in another suit except by the same officer & if they are otherwise attached in a second suit the officer executing the first suit must pay over the surplus if any to the debtor — So in Ct. & presumed on principle — The rule is said not to hold of diff. deputy Sheriffs — for the prop. of each is the prop. of the Sheriff — Case the same strict of seizures on exn. — Seems of attachments of land. 5. M. & R. 271. 2 - 4 - 5 -

Unan. on St. the fee simple of lands may be taken in exn. — The St. mentions no other estate in lands. St. 283 1 Bu. 132 -

But the St. has been extended in construction to all lands & tenements. & the mode of setting them off on exn. is the same whether the estate is a fee or any less estate — Semb. 1 Ray 96 1 Bu. 335. 2 Rod. 15 Dd. 338 & even to equities of redemption 1 Ray 93 tho in Eng. an equitable interest is not liable to exn. 8 East 467 2 N. R. 461.

Before the Sheriff takes the land he must make demand of the debt at dfts place of abode (if within his precincts) & if upon such demand the money is not paid or suff. personal property tendered as found the exn. may levied upon the real estate. 1 Bu. 332 2d 282 1 Rod. 241 St. 282

May be not levy upon the real estate unless personal property is tendered — especially as against the debtor. St. 282. ut. sup. —

Executions

But if real estate is taken without demand or after suff. money or personal estate is tendered / or perhaps found / the levy is illegal & void – The demand must appear in the officer's return otherwise no title is acquired – St 282. 4 1 Root 241

Where it appeared in the return that Deft. in ext. appointed one of the appraisers the title was held good tho no demand appeared in the return / 1 Root 241 / for a demand was presumed / 1 Dev. 336 – / But since the St. of May 1800 the rule cannot be law & indeed it never was –

If the land or other real estate taken by the officer is to be appraised by three indiff. freeholders of the town in which &c. or if the town is a parcel of one adjoining town one to be appointed by Pltff one by Deft. & if they do not agree on the third he is to be appointed by the next Justice or Justice of the Peace who may by law judge between them & if either party neglect to choose the aft. he is to appoint two appraisers to be sworn – If both neglect he is to appoint three St. 283 340 1 Day 109 1 Root 196 2 434 1 Dev 333 –

A tenant to one of the parties is not disqualified to be an appraiser 1 Root 141 1 Dev. 335 –

But a person as nearly related to one of the parties as an uncle or nephew by consanguinity or affinity is – 1 Day 109 St. 423

An appraisement by persons not freeholders is void tho the parties agree upon them – 1 Dev 336 1 Root – 196 –

Claimed that if a feme sole obtain an ext. & marry she may during coverture appoint an appraiser – 2 Root 15 qre –

A sale under an ex^n shall not be avoided by a reversal of the judg^t for error 8 Co 284 192 2 Ba 606 Semble where the ex^n is set aside for an irregularity which renders the process void 2 Wils 385 2 Ba 740 1 Sev 95 3 Wils 345 1 Cowen 734. but the first case the fault is in the Court — in the last in the party 3 Johns R 523 Post 772

To make out a title to land by levy of ex^n it must be shown that that the appraisers were sworn freeholders & resid^g according to law 1 Day 109 1 A R 299

At a sale under an ex^n the certain lots must be pointed out to the bidders & sold specifically & separately. if lots without any certain designation at the time of sale the purchaser acquires no property. 14 Johns R 353 222 1 John Ch 287.

Money may be taken on ex^n of Bank bills 1 Lev D 796 considered as cash 1 Burr 457 12 Johns 220. 396 19 do 145 1 John Ch 334 4 Wh 245 – 1 Caines. 117.

But a chose in action as a promissory note cannot be sold on ex^n 1 Bowen 240 9 John 100 –

Money collected on ex^n which is in the hands of the Off^r cannot be taken by the Off^r upon a diff^t ex^n against the first ex^n creditor – 1 Caines 117.

consume apparent on appraisement. 2 Rose 16 qu –

Return by the officer that the land was appraised at such a sum by C. B. & indiff. freeholders appointed & sworn by C. Justices has been holden suffn. tho it did not show that the parties neglected to appoint. 2 Root 534. qu.

By the "next appn. or Justice" is not meant the nearest but any one in the town in which the land lies. 1 Root 141 1 Bro. 335.

The officers to name the exn. with his endorsmt. upon it to be entered on the town records & to return it to the Clerk of the Court from whence it thereto be recorded which then completes the title. St. 282 1 Root 1, 89 1 Bro 333

Holden in 2 Root 51 / that Pff in Ejectmt. after levy of fmy. must produce a copy of the judgt. if required St. 282.

Recording by the town Clerk only Clerk of the Court only is not suffn. - Holden however that a copy of the record by the Court & a certificate by the town Clerk was suffn. 2 Root 521 1 Root 489. 557. 1 Bro. 333 2 521.

Sending to the Sheriff of the amount of the judgt. before the exn. is recorded or entered perseal defeats the title. C. R. 1811 No.

Of the whole interest in the subject which a court is must be taken - by lending hands till the rents & profits arising the debt is not provided for by one hand - It has been ruled in Ct. to levy exn. & attachmt. on the crops growing in case of tenancies at will & on short leases & thereto sever & sell them as personal property - but this the Jury seems not to warrant. / 1 Bro. 334 / tho it may be done in Eng. under a

Dev. fee. Sect 358 Com exn Ey

The more regular way seems to be to take the whole of lessee's interest in the land by appraisal under the St. 1 Dev. 337 2 Root 328—

By our law if suit is brot & judgt by default recovered against a Defdt out of the State a bond is to be given to refund &c. In such case if exn issues without bond given the judgt is erroneous & by reversal the exn title may be defeated — But no person save Defdt & his representatives can take advantage of this — his creditors cannot — 1 Root 176 391 1 Dev. 267. 333 — ind 10 Min 356 & Ct 115

All exns inter. must be made returnable within 60 days or at the next term between which & the date are sixty days — If made returnable according to law generally it is to be returned at the next term which is 60 days or more from the date. 1 Root. 101 St. 283 2 Dev. 281. B

When issued by a single minister of the Law it must always be made returnable within sixty days. St. 283 —

A levy made after the return day is void & no title required by it for from that time the writ has no force / 1 Root. 101 1 Day 1. / Here the officer is liable if he do not return the exn within the time / 2 Dev 281 / An Exn if all the money is levied the exn could not be returned. Sect 318. Ba exn 333

But if the levy is begun during the life of the exn it may be consummated afterwards — for the whole has relation to the first act. 1 Coo 99. 3 Co 29 4 Co 71 Doug. 264. 2 Caines R. 213.

No title to real estate passes to the purchaser under a sheriff's sale without a deed or note in writing in 4 Ch. 26 Ann. Ch. 61 2 John. Ch. 248 Ch. Sa. 520

B. And after the expiration of the 60. days it is of no further force & an arrest under it is a trespass 3 Day 1.

13 John 97. that a sale on ex^n to a bona fide purchaser cannot be defeated for error or irregularity in the issuing of the ex^n or because no levy was made until after the return day. vis also 8 Mass 326 2. 529

no title unless the ex^n is returned 9 Mass 158. 242 4 Mass 770

If creditor & debtor in ex^n agree that ex^n shall not be levied in a given time yet if creditor within the time finds the ex^n in an officers hands he must execute it the agreement no defence for him 3 Ll R 117

If two creditors attach lands at the same instant of time & cause their ex^ns to be duly levied they take moities of the lands 13 Mass 527 1 Rev. 156

If creditor directs an amount less than the sum due on the ex^n he cannot have a new ex^n for the residue for he should not be permitted to harass deft with repeated ex^ns. 3 Mass 331

Executions

The levy of an exn. does not oust Defts. of the property but merely vests the title. Pltff may then bring Ejectment. 2 Show 85 3 Mk 203 2 Ba 355

Alias exns. are here generally granted by the Clerk of the Court of course without application to the Court. 2 Sev. 81.

If an exn. is endorsed satisfied upon a void levy Pltff. may by Sci. fa. or as it is said by motion to the Court in Ex. obtain a new one - As when exempted property is taken & the levy deserted. / 1 Root. 153 2 Sev. 281. / So in gen. is ineffectual - As if Defts. escape &c Leith 193 5 Co 87 Hob 60 2 Ba 354 Com. exn. F.

At C.L. it cannot in gen. issue after a year & day without Sci fa / 2 Ba 354 1 Ib. 351 Leith 30 Cro J 364 2 Saut. 469. 1 Ro 290 Sal 258 / In Ex. there is no time limited within which exn. must issue after judgt. 2 Sev. 331.

Exn. can be prayed out only by one who is privy or party to the judgt. 2 Com. exn. & 1 Ba exn. F.

In a real action if Pltff die after judgt. & before exn. it may be sued out by Sci fa - by the heir Com. exn. & 2 Ba 358 411 2 Saut. 469.

If the action be personal the Exr. or Admr. may sue out exn. in the same way / 2 Saut. 305 1 Roll. 389

If an Admr. durante minore aetate of an Exr. obtain judgt. & before exn. the Exr. attain full age he may have exn. by Sci fa & now by 1 Ch. Ca 2 - if an Admr. having obtained judgt. die before exn. the Admr. de bonis non may have exn. by Sci fa. Sems at C.L. - 2 Ba 356 6 Mod 290 Sal 328 Ld R 1072 Cro J 4 Yelk. 83

× qu. in Ct. where we have no such thing as real & personal ex^ns
and the representatives of deceased
in Eng^d - 2 Saund. 51 n 4

If an ex^n be tested after the Off^s death it is irregular but may be amended. It may be issued after his death if tested before - as between the parties the ex^n has relation to its test - Sees as to purchasers 1 Cowen 34 Fidel 915 Comb 33 Croc 459 Roche arg^d 6 JR 368.

If a Justice issue a 2^d ex^n after the first is satisfied he is a trespasser altho, he issued it on a false representation that the first was lost - Off^r not liable 6 Mend 368.

1 Dia 29 1 Roll. 188

× If judgt. be obtained against two & one of them die before exn. Pltff. may have exn. against the survivor by sci fa - 2 Ba 359 Kay 26 Sec. 30 1 Reb. 92 123 Com Pt. 3 S 13 -

If judgt. be had against one who dies before exn. leaving lands in fee simple to his heir exn. may be sued out against the heir by sci fa - or rather against the lands in his hands - 2 Ba 359 Cy 81 20 344 1 Saut 290 Cro S 186 -

If the heir be within age the pard must demur - or exn. may issue by sci fa against the Exr. &c. 2 Ba 350 1 Saut 290 1 Roll 140 Com exn. Reat.

If the writ of exn. be tested before Coff. death it may be executed afterwards without sci fa - 1 Roll - 893 Cro E 184 1 Leon - 144 2 Vent - 218 2 Ba 352 Com Exn B -

How far is this allowable in Eq.? for it may defeat the average among creditors -

If judgt. be given against Baron & feme & Baron dies before exn it may issue upon sci fa against the feme - Ba exn. G. 4 - Baron & Feme 1 Roll 890 Cro E 518 2 b. 3 Reb. 205 -

Bees in a tree belong to the owner of the tree unless their former owner have railed round & can identify them in which case the, he cannot enter & take them himself he may sue any one who does 15 Mass 550

If one finds a bee tree on another's land & marks it he has no right to it 7 Johns R 16. 9 D 35. 10 Cowen 244 6 Johns 5 14 Ala 406

use of the authority so great a trust, implying a trust reposed

A license to enter on the lands of another & do any act without possessing any interest in the land is not assignable & is valid tho not in writing but a license to assert a claim & maintain it so long as there shall be notice to me is a transfer of an interest in the land & must be in writing or it is void 15 Mass 381 Pabn. 71 Timber growing may be sold by parol 10 J.R 182 but grass growing cannot be 6 East 401 2 Taunt 38 parol sale of potatoes goes 11 East 362. the grass not being matured damp the potatoes — Sale of growing crops by parol good 2 Johns 418 421 qdc 112 9 Cowen 42 5 Johns 276 & 1192

Trespass to things Real

Its general nature - L.196

Trespass in its gen'l sense signifies any transgression of Law. 3 Bl 208 Esp 380

As considered under the present title it means an entering on the lands of another without lawful authority & doing some damage or treading the herbage &c 3 Bl 209 S.N.B 87 Esp 380 2 Lev. 74

In certain cases however an entry on another's land &c without licence is allowed by Law - Ex. So execute legal process - By reversioner to see whether waste is committed &c / Esp 380 3 Bl 212 - 8 Co 146 2 Lev. 74. / So if one lease lands excepting the trees he may enter to take & sell them - vt Sufs & Shefs. 89 11 Co 52 - - not 780.783

So to hunt ravenous beasts - because for the public good / 3 Bac 180.29 2 Bulst. 62 Cro J 321 3 Bl 213 1 Bl R 334 - Contra Com. Trespass C. 2 Roll 558 / But the hunter may not dig for them on another's land - Semb of other animals Semb / 2 Lev. 75 5 Bac 180.31 2 Bulst. 61 Esp. 404 Sel. 556 / vice - Mod 75 Sel 556 that if a stag or hare on his own land he may pursue it into the land of B - qre - for his qualified property is gone - 2 Bl.

If an animal ferae naturae is started & killed on my land it is mine - Semb if driven into another's ground & there killed it is the hunter's - Esp 414 Sel 556 2 Lev or Lev. 74 Vid 3 Comin Dig 175. 7 John R 16.

But C.S one has no right to glean on another's land. 1 Bl. Bl 51 3 Bl 212 Gilb. L 253 - Contra Esp 413

Whenever the Law gives a licence any subsequent unlawful use of the authority so given makes the party a trespasser

ab initio - for it is said the legal presumption arising from the subsequent act is that he originally entered for the purpose of committing the unlawful act. 2 Bl 313 8 Co 146 Cro J 148 Finch L 4 2 Roll 5 Bl L 381 5 Ba 161 / qu - Is this the true reason? Is it not rather that there is a tacit condition annexed to the licence which is thus broken? The law will not suffer one to be injured by its licence Eg. A traveller entering an inn steals any thing in it. 5 Ba 162 2 Bl 213 Finch L 4 Esp 381.

So a landlord having distrained for rent kills or injures the distress. 8 Co 146 Cro J 14 1 Sk 12 5 Ba 161. 5 Mand 504 -

But in gen. a bare nonfeasance or neglect cannot make one a trespasser by relation - It supposes no act - a mere omission trespass is a tortious act - there must be a misfeasance. Eg A traveller at an Inn fails to pay for his entertainment - this is merely a breach of contract & case is the proper remedy. Esp 383 8 Co 146 2 Bl 213 5 Ba 161.2 / So if distrainor refuse to deliver back the distress on tender of amends before impounding - 5 Ba 162 -

The last gen. rule does not hold it is said of a Sheriff who having made an arrest on mesne process omits to return the writ - for without being returned it cannot be given in evidence - Perhaps this is not strictly a trespass by relation - for the arrest does not appear to have been originally unlawful - besides where a further act is necessary to complete what is begun by licence of law the omission of it must leave the original act unjustified. 5 Ba 162 Sel 409 89 D.R 632 1 Bon 378 Cro J 446 Esp 412 5 Co 90 4 by 1 Wils 171 Cro 20 -

When one enters upon the land of another under a licence in fact found

When an act is lawfully done it cannot be made unlawful ab initio unless by some positive act incompatible with the exercise of the legal right to do the first act – the mere intention of doing a subsequ.t illegal act is not suff.t to render the first unlawful. 20 John 429 11 do 241 14 do 146

So of Sheriff levies for more than directed not a trespass ab initio 11 Cl & Fin 281

No action on the case for the same name an action of trespass cannot be sustained for an injury done in an other State – the injury being local – Rule where the injury might have been committed any where the action is transitory but where local the action is local 6 Hill 86. 11 Wh 505 If the objection appear unequivocally in the declaration a demurrer may be taken but where local under a ne-debet or otherwise advantage may be taken on the trial 1 Saunt 390

no person except men who has the actual poss.n at the time of the

A Rail Road Company being equally interested with the adjoining proprietor in having fences is bound to build & maintain one half 4 Pairs Ch 554

Fences are part of the freehold & their materials accidentally or temporarily detached without any intent in the owner to divert them from their use as a part of the fence undergo no change in their nature 2 Hill 143 20 Wend 639.40

Manure on between landlord & tenant belongs to the landlord i.e. it belongs to the farm on which it is made it is a part of the freehold 15 Mass 169 - Nor it lies in heaps in the farm yard 6 Greenl. 222 21 Pick 367 7 Cush 203
But as between Vendor & Vendee the rule is stronger in favor of the latter & manure in the barnyard passes to the vendee 30 N.H. 503 21 Pick 367 2 Hill 144 Mich 2 Mass 346 Ste. 66

Trespass to things Real

the battery & subsequent abuse does not make him a trespasser by relation for "legitimis non dominantibus &c." 5 Bac 162 1 Brist 142 & Co 146

To constitute a trespass the act causing the injury must be voluntary it is said - for if done involuntarily & without fault no action lies Esp. 383 5 Bac 185 Str. 655 - / But this rule is not true in cases in which the act complained of is committed by Deft. himself - here the Law does not regard the intent - Stone on Sufr. of any age or a lunatic is an liable in trespass 1 Ld Raym 339 Esp. 399. Sutch 13 110 119 Cong. 349 1 Dont 81 Raym 269. 3 B & P 806 5 Bac 176 / At any rate it cannot be true that wrong must be voluntary. Com. Dig. Co. A.

Neither will mistake or any accident not inevitable excuse in such cases. Esp. 383 3 Lev. 37 Com Dig. Co. A.

The rule then applies to cases in which the act is committed not by Deft himself but by some other agent to whom he stands in a responsible relation - Here it must be voluntary on the part of Deft. himself - as where Deft's dog chases Pltff's cattle off Deft's ground into Pltff's. Esp. 383 Poole 160 4 Burr 2092 Sutch 113 10. 19

This action will not lie for an injury committed on land in a foreign country, the action being local. 3 B & P. 3 113 Str. 1115 Esp. 402 Pl. Ch. 29.

This action for trespass on land is called "trespass quare clausum fregit" from the words of the writ - on a house "quare domum fregit". 3 B & P. 309 Ch. N. B. 87. 3 Com Dig. 84.

Who can maintain this action

No person except him who has the actual poss. at the time of the

injury done can maintain an action quare cl. fregit - The reversioner or remainder man cannot - for trespass is an injury to another's possn. 5 Ba 166 37 2 Sen 209 Saville 263 2 Bulst 268 4 Sean. 184 Ejo 383 404 Com.

The right of possn. Sent. in Ct if no other is in actual possn. is suffn.

Said that the possn. must also be lawful & that an intruder cannot maintain the action/ 5 Ba 166 2 Sean 149 Plowd 546 4 Sean 184 2 Sw. 76/ But it seems that this rule holds only as between a wrong doer in possn. & him who has the right of possn. - for it has lately been holden that any actual possn. is suffn. to support the action against a wrong doer/ 1 Cont 244 - Saches, 156 Burr 1763 Str 1238 Mills, 221 4 Co 51 Ejo 403/ Seem. in Ejectment then Pll must have the right of possn. 2 Str 719 Ally 2 Sw. 77

The person in whom the freehold is cannot generally maintain this action for an injury done to it while in the lawful possn. of another - actual possn. in Pll being necessary/ 5 Ba 166 2 Roll 554 4 Sean. 184 Cond/ & according to the theory of the law he cannot recover tho the possn. of the third person was unlawful - but in this case he may after regaining possn. maintain the action by fiction of Seen tho not possessed in fact at the time of the injury.

An heir cannot maintain this action in Eng. unless he has acquired actual possn. by entry tho he may make a lease before 5 Ba 166 Ejo 404 Plowd 142 2 Roll 553 Cond.

A person disseised of land cannot before re-entry maintain this action for an injury done to it between the time of his disseisin & re-entry - for he is not in possn. at the time of the injury. Ejo 418 232

Ownership in Ct. is suff.^t. 4 Day 506 1 Ch. R. 87

Letting land on shares if for a single season only is no lease & the owner alone must bring trespass for breaking the close bro E. 143 – 8 John 152 But for damage done to the crop in such case both must join the other non joinder of one is pleadable in abatement only 8 John 152 1 Saund 291. g – 1. Rend 380 & also that where the owner has not the right of poss.^n as where the premises are let at rent or tithe he cannot maintain trespass if the injury is of that nature as to entitle him to sue as tenant of the freehold he must aver his interest accordingly –

of repair or will make repairs himself – the rates may name

Where a person upon fences the boundary line between him & his neighbor he is estopped from showing that the line is erroneous in an action of trespass against his neighbor for taking a fence put in by him relying upon the correctness of such line. Mundy 65.

Servant can sustain this action against landlord for entering to make repairs unless there is some stipulation to that effect 14 C & L 449

[illegible] cases on the same of the ensuing [illegible] 418 432

5 Ba 166 2 Roll 553 5 Com Dig / But suppose his estate determines in the meantime so that he cannot re-enter he may have the action of mesne profits 5 Com Dig B2 2 Roll 556

After disseisee has re-entered he may maintain the action against disseisor for subsequent injuries — for as between them disseisee is considered by relation after re-entry as having constantly been in poss^n / as in an action for mesne profits after a recovery in Ejectment / Said with a continuando / 1 Co 32 5 Ba 166 Hob 68 2 Saund 282 1 Roll Ab 100 2 Co 55 1 Saund 237 Com Dig / qu — Can he bring trover for the property conversion against a second disseisor? Doug. 21 Pow M 73-4

Disseisee may have the action against disseisor for the out of disseisin — i.e. for the first entry before he himself re-enters — for he was then in poss^n of Esp 104 Com Dig B2 / So of a trespass done before the disseisin — 5 Ba 168 2 Roll 553 Esp 148.

A person in poss^n either of a freehold a term for years or an estate at will or sufferance may maintain this action — so also of any person in actual poss^n by disseisor. Com Dig B1.2 2 Roll 551 5 Ba 167 1 East 214. b —

But tenant at will by sufferance or disseisor can maintain this action only against a stranger — not against lessor or person having the right of poss^n — for the latter may enter in either case & destroy the tenancy or disseisin / 2 Bl 150 1 Saund 57. 57 2 Bl 173 5 Ba 167 2 Roll 551 1 Sid 347 1 Co 59. / Lessee of tenant for years he may sue at lessor — 5 Ba 167 2 Saund 115 1 East 139.

If lessor at will invade lessees emblements the latter may have

Trespass to things Real

Trespass against him 2 Wil 14b Semp. Lick 5 Ba 167 Com Dig B1 Cro E 143 Cro J 402

Said that ~~tenant~~ at will cannot maintain the action against any one who enters by "color of right" / 5 Ba 167 1 Lev 347 / sedqu. if Deft. was actually a wrong doer for against such a one any poss. is suff. Com Dig B2 2 East 224

Lessor at will it is said may maintain the action against a stranger if the trespass injures the land - for the poss. of lessee at will is the poss. of lessor. Com Dig B2 2 Roll 561

If lessor of a term for years reserve the trees he may have trespass qu. cl. fregit for cutting them down or injuring them during the term - for by reservation of the land on which &c. is reserved & thus he retains poss. 5 Ba 167. Cute 775. 783

If lessee at will commit waste lessor may have the action against him - for such an act determines the estate & makes lessee a stranger - Com Dig B2 1 Burr 57 1 Roll 850

A person entitled to the reversion or heritage of the land may have an action of trespass qu. cl. fregit for a trespass done to it - but he must be in poss. of the reversion at the time the injury is done to it / 5 Ba 167 1 Burr 4 2 Roll 552 Mod 302 Com Dig B1 Cro E 421 Dy. 285 3 Wil 210 2 Sho. 76 / Contra 3 Com. 213 / & he may have the action tho Deft. entered by permission of the owner of the land 6 East 102.

But Pltf. need not in any case be in poss. of the land at the time of bringing the action - the right of action when thus

One having a right to the land acquires by entry the lawful possn of it - he need not declare that he enters to take possn - it is suffn if he does any act suitable to such intention - & may then maintain trespass against any one who enters or continues in possn 14 L.J. 60 7 T.R. 431

On account to sow diffn sorts of grain & yield to the owner of the farm a certain proportion of each crop is not a lease to render rent for which an action for rent will lie agst the tenant 15 Mond 379 5 Johns 151. 3 de 221. 2 de 421 n. 8 Cowen 226 unless as in 4 Johns 108 from the phraseology of the instrument it is evident the parties intended a reservation of rent -

Ff. sold to J. trees standing on B's land with power to remove them when he pleased - J marked them accordingly & took part away - Held that the transfer to J. was complete -
29 L J 288 cid 6 East 614 2 Camp 240 5 Bac & Ad 57

injury is done in suffr. / Com Dig B 2 2 Roll 559 9 Bac 167 / Plowd 243 / 4. After the trespass tenant sells the land

This action lies for injuries to land unenclosed - for the word "close" does not necessarily mean an inclosure. Cheitt 173 Dat. & Ke. 30 7 East 207 Hob 1004 6 East 153 Burr. 133

The owner of the soil of a highway may have trespass qu. cl. fregit for an injury done to it / 5 Bac 167 / Hob 1004 3 Bac 54 Burr 143 Esp 428. Contra 1 Bult. 157 - & Stiles v. Cunti. C. & 1810 ruled that Ejectment by a town proprietor will not lie

If land in possn. of A be rented by B who is to have one half the crop B & it is said cannot join with A. in trespass qu. cl. fregit for an injury done to the crop before it is reaped - because not in possn. / 5 Bac 167 Cro E 143 2 Roll 558. / But it has been holden that they might join for an injury done to the crop tho not in trespass qu. cl. fregit while shared be lost by A alone / Cro E 143 - / sed qu. - for since holden that if A agree with the owner of the soil to plough sow & give the owner half the crop A may have trespass qu. cl. fregit for treading down the crop & that the owner is not jointly interested in the crop growing but is to have part by way of rent after severance. Esp 402 Burr 183 2 Sey 77.

Husband & wife may join in the action for an injury done to her land for the action would revert to her. Esp 406 Cro E 96 113

Tenants in common as well as joint tenants should join in trespass for injuries done to their land holden in common as the action lies in the personalty - for tho their estates are

several yet the damages to be recovered are not so - So also of Copareners. Esp 404 Litt. 313 1 Burr 198 2 Bl 1194 2 H & B 387.

If a commission of bankruptcy has been issued against one who was not an object of the bankrupt laws & the assignees take possn. of his house & goods this action lies against them the commission being void. Esp 398 3 Wils 382 1 Ld. Raym. 480

For what injuries this action lies and e contra

Every person is answerable not only for his own trespass but also for those of his cattle & if they by his negligent keeping stray upon another's ground & much more if he permits or aides thereunto / he is liable for the injury they do in an action of trespass - Seem if they enter thro the neglect or default of the owner of the land - as thro an insufficient fence which it was his duty to repair. 2 Bl 1114 5 Ba 179 81 2 Roll 565

But in this case the party injured has his election of two remedies - He may distrain the cattle damage feasant & hold them impounded till satisfaction made or bring this action - 2 Bl 1114 5 Ba 179 Esp 286

The action lies against the owner of cattle & according to some opinions against him only - according to others it lies against either the owner or owned 5 Ba 188 2 Roll. 546 Esp 387

But he cannot regularly pursue both remedies - if he brings the trespass he cannot distrain & e converso - he can have but one satisfaction. 5 Ba 179 Sed 248 12 Mod 663 Esp 387.

A Person going or riding on the land of another & taking away his own property is a trespasser 14 Johns 406. 6 Cow 8

1. Hh 13 tenant for life erected a fire engine for the benefit of a colliery on the estate - held to be prem.s property & might be removed 1 Hh Bl. 11 that erections for carrying on a trade made fixtures & put up by tenant may be remov.d by him Bull. N.P. 34 tenant permitted to remove a barn erected on the premises & put on pattens & rollers - 3 Eliz 11 that the law is made the most favorable construction for the tenant & permit erections by him made for the benefit of trade to be remov.d at the end of the term. 20 John 39 that a dwelling house erected may be remov.d by tenant if he enters upon the premises for this purpose after the expiration of the term tho he may be liable as a trespasser on the soil yet the property in the erection is not changed but remains in the tenant vide 1 Bro 518 vide 5 Day 464

3 Bac 38 erections by tenant were of brick & mortar tiled & the foundations 1 & 1/2 feet in the ground held fixtures & not removable as between landlord & tenant

Trespass to things Real

Holden that if A by a tortious act puts B's cattle on A's land A may distrain them damage feasant / 1 Roll 665 1 Roll R 249 Ba Entries 8 Selw. 17 / qre for A cannot have trespass against B / Com 1 = 61 2 Roll 563 / Are not the cattle mere instruments of mischief in the hands of A?

If A's tree be blown upon B's land trespass does not lie against A for taking it away. 5 Ba 178.

The falling of a tree is not the act of A - but the cutting & consequent falling are - the former inevitable - the latter not so - If A's timber floats on B's land & does damage A it is said is liable qre unless he is negligent - & so he liable in trespass or case? 2 Ab 1 / 237. in case Semb.

If A's beast being stolen is put into B's close A is justified in going after it & no action lies against him. 5 Ba 178 2 Roll R 55

If the fruit of A's tree fall upon B's land no action lies against A for going after it - for the falling could not be prevented. 5 Ba 178 Selth 120 Cong 719 arg.

But if the roots of a tree standing on A's land extend into the land of B they are tenants in common of the tree & fruit - Semb if the roots are not extend into B's land tho the boughs shadow it. the whole belongs to A - Bull 86 Str R 787 -

If A's cattle prop into B's land & thence into A's A may have the action against B even tho they propped thro the fence of A - for A is bound to fence against such cattle as B the adjoining owner may put into his close - & A may have

this action tho his fence is out of repair 3 Bu 189 South 181 1 Freem 379

If A being bound to repair a bridge cannot do it without going upon the land of B he is justified in going — necessity. 3 Bu 189.

If A has sold trees growing on his own land to B — B is justified in going upon the land to cut & carry them away — for this right is implied in the sale. 3 Bu 180 2 Roll 565.

Once holden that if one go upon the land adjoining a navigable river to tow a boat the entry was justifiable — for public good /5 Bu 180 Ld K 253 Burr 2092. 3b/ but this is not now or ever allowable except by special custom. 3 Ld K 253 Burr 2092. 3b —

It seems to be agreed that if a public highway is impassible travellers may go on the adjoining ground — public convenience — / Doug 7b. 19 2 Show. 28 for Sens 296 3 Ld K 253 2 Bl 3b Com — See 234 2 Sw 7b Esp 400 / Ld K 725 qu — if the land be enclosed?

The rule supra does not hold as to private ways — Public not interested — grantee's duty to keep it in repair 2 Sw. 7b Doug 7b 2 Bl 3b Com contra)

A person cannot maintain this action for injuries done to grass growing on land in which he has a bare right of common — for tho he has a right to take it by feeding his cattle he has not the prop^y — nor is the property his — the right is incorporeal & if disturbed in the enjoyment of it he may have trespass on the case. 5 Bu 1b7 2 Roll 552 2 Bl 33 —

Entering another's house without permission or lawful authority

6 Mss. 90 that one is bound to fence against such cattle only as are lawfully in the adjoining close - if cattle can not be lawfully there which have broken in they the object of a fence which the owner of the adjoining close is bound to repair 1 Cowen 85 n 3 Wend 147

So if cattle escape from the highway into an adjoining close there, an insufficient fence the owner of the close may maintain trespass for the public have no right in the highway except to pass & repass 1 Burr 143 2 Str 1004 1 Wils 107 6 East 154 2 Johns R 357. 363 15 do 483 6 Mss. 454 16 do 33 - 6 do 94 per Parsons J. 1 Saunt 539 19 John 385 3 Bl. C 209 Selw 1224

qu - can the legislature enable towns to pass bye laws authorising the depositing in the highway? Court Ct. Ad. S. p. 11 - the adjoining proprietors are the owners of the highway subject to an easement vested in the public - a right of passing - & nothing more is vested in the public - ind 16 Mass 36 1 Cowen 90 n - 3 Wend 147 -

When a party having been arrested escapes & flies
himself up in his house the officer may break the
door & entake him without reading his warrant to him
or demanding admittance if on fresh pursuit & in trespass
against the officer who justifies under an execution
it cannot be shown that he fraudulently served the
original process as by serving it with an wrong return
day so that the party has no opportunity of appearing
the remedy must be direct by suit for false return
writ of error or a suit by them collatterally impeaching
the proceedings 10 Mass 300 1 Salk 78 Bull 62 Fort. 6.d
320

8 — some manner permission or compel attendance

is in strictness a trespass that the door be open. 5 Ba 182 2 Roll 555 2 Roll. R. 208.

But if the owner has unlawfully taken the goods of another into his house the latter may go in after them the door being open without permission — the owner being the first wrong doer. 5 Ba 182 Cro E. 246 2 Roll R 56 2 Saund 1385

So if he enters to suppress a riot or other disturbance of the peace for in these cases the law gives the license — So the law allows one to enter the house of another to pay or demand money there payable if the door be open. So to execute process of law. 5 Ba 182 3 B 212 Ro 380. 1 Ld. 775. 780

Also a house may be broken open for the purpose of executing criminal process provided the officer first demand admittance or declare the cause of the demand otherwise he will be a trespasser. 5 Ba 183 5 Co 91 4 Leon 41 4 Ba 454 Ld 74

But the Sheriff cannot justify the breaking the outer door or window of another for the purpose of arresting his body or taking his property on civil process — his castle. 4 Ba 454 5 Co 91 Cowper Cro E 909 Hob 62 Ro 604 Kirby 383 2 Ba 387 5 B 183 —

But this privilege of castle is construed very strictly — It extends to the outer door & windows only — not to the inner doors chests &c there after demand & refusal may be broken open — Neither does the rule hold against a writ of Ficias facias Prop. Comp. 4 Ba 454 Kirby 383 Hob 62 2 B 3 Ro 604 5 Co 91 2 Ba 99 5 B 183 — Ad 1. Ld. 98 99. 100 Wm. Ld 774

Trespass to things Real

An officer is justified in breaking a house to execute a legal search warrant. 1 Hal. 150 Ep. 399 2 Ld. 275

But all gen. search warrants are illegal & furnish no justification - strictly void - Ep. "So search for goods in all suspected places" - 399 Kirby - 213 2 Ld. 275 91 Hob 253 1 Lev 31 Latch 409 Sal 418

No search warrant is legal unless issued under these restrictions -

1. The party applying must make oath to the facts on which the application is founded & to his belief that the goods are concealed in such a place. Ep. 399 1 Hal 150

2. It must be executed in the day time & by a known officer -

3. It must be executed in presence of the informer.

The warrant being legal the party who obtained it is justified or not by the event tho the magistrate or officer are justified whatever the event may be - the party against the risk - Ep. 399 Ep. 135 2 Ld. 291.

This action lies not against the master or seamen of a public ship or privateer for taking property as prize on the seas tho the property may have been adjudged not lawful prize - for the question whether prize or not belongs exclusively to the Court of Admiralty - This respects personal property. Ep. 401 Doug 401. 80 1 Sev. 243 1 Sier. 367.

For Tr. Trespass in Tr. lies 2 Sw. 801. Tr. 422

Trespass will not lie against a party who has procured a search warrant the search for stolen goods if it be duly issued & regularly done whether the goods are found or not Wilmot 382 But if the party had no grounds for his proceedings & was actuated by malicious motives Case is the remedy ibid 164 40

Tenancy being determined landlord may not turn tenants family out but if no one is in possn he may enter & tenant & his family absent a house locked up - 25 E. L & 398. 4 Mod. 754 in the last case tenant & family were absent but his goods were in the house locked up landlord entered & replevied held it justified Bid At. Ct 250

Where over beasts are lawfully on the land of another & from thence escape into the lands of a third the owner of the cattle is in the same situation as is the owner of the land from which they escaped - if the one is liable to the third so is the other 3 Hill 41. 1 Cow. 791

Trespass to things Real

Against whom this action lies and e contra

It lies not against a lessee for years for cutting & carrying away timber - for lessor is not in possn. of the close - remedy is writ of waste - Esp 401. Cll. 83 4 Co 62 Litt. § 71.

But if after being cut they are suffered a time & then carried away trespass by lessor will lie - not indeed for the cutting but for the carrying away - the property is then a chattel personal of which lessor has the possn. in law - the action however is not trespass qu. cl. fregit. Esp 400 4 Co 62

If one lease land except the trees. lessee is liable in trespass for cutting them - the lease does not entitle him to the possn. of them Esp 400 1 Brut 57

So the action lies for lessor at will against lessee for cutting timber trees upon the land - for the act of cutting determines the estate & possn. of lessee - Esp 400 1 Roll. 860 1 Inst. 57. Litt. § 71. So if he does any other positive injury to the subject - 5 Ba 188 5 Co 13 Cro E 784 Dy. 122 -

But it does not lie in such case against tenant at sufferance unless lessor has entered - for the act does not determine the possn. estate - of course before entry he is not a disseisor nor a stranger but a tenant in possn. Esp 400 2 B & C 130

The trees are excepted in a lease for years yet if injured or destroyed by lessee's cattle the action does not lie, for lessee has the use of the soil & a right to put his cattle upon it - Esp 400 5 B & C 787

Trespass to things Real

This action will lie against a lunatic - for malice is not necessary or intention required. 5 Ba 184. 1 Rol 134 Salk 13. 110

Every person engaged in the trespass is liable to the action - all are principals - Or if a command or request to commit a trespass & he does it 5 Ba 185 1 Sen 124 4 Bl 38 1 Rol. 813 3 Bul. 409.

If A agree to a trespass & - takes the benefit of it - / for his benefit by B he is liable tho he did not request or command it. 5 Ba 184

If several join in one trespass the party injured may have the action against one or more or all of them 5 Ba 186 8 Co 137 5 Ba 649

Said in 5 Ba 186 - that if the party injured has had his action against one of them he cannot bring an action against another for the same trespass & that the pendency of the former is a good plea in abatement - But this is not law - He may sue each in a separate action - tho he can have but one satisfaction - one recovery in damages. / 5 Ba 192 Str 420 4 Ba 115 Cro 373 Yelv. 67 1 Rol 88 Esp 415 - / Hence a former recovery against is a bar to an action afterwards brot against another of them for the same trespass. 5 Ba 185 4 115 Cro 373 Yelv. 67 Esp 415 Cro E 30 n 80. Salk 553 Ld. 553.

Said in 5 Ba. 185 that an acquittal of Deft. in the first action is a good bar to the second & cites Cro E 668 which does not support the proposition - not law as it now stands -

If the person who has granted the rectum & herbage of his land to another disturb the grantee in the enjoyment of it trespass lies against him - So the action lies against Repor

If a tree grows on the confines of the land of two proprietors so that the roots extend into the ground of each it belongs to the owner of that land in which it was first sown or planted 22 C.L. 244 2 Roll R 141 contra 1 L.R. 737

If an adjoining proprietor remove his part of the division fence in pursuance of the St. he is still liable in trespass if his own cattle get into the adjoining close 3 Marsh 147.

The word "close" may in some cases signify the party, interest in the place Doct & Stud. 30 11 Co 55. It is always to be understood secundum subjectam materiam 29 C. D 240

The term "house" & "messuage" differ "house" can only be intended there the small & of building - "messuage" may mean the building & part of it & also the curtilage 29 C. D 433 3 Burr. 65

Trespass to things Real

for life or years for a trespass upon lessee's possn. 5 Ba 18 1 Bat 602 Pr. 139 Cy 285—

If C's cattle being agisted by B breaks into the close of C. B is liable & according to some opinions B. only. 5 Ba 188 2 Roll 46 Ej. p 389 Saul 161—

If C's cattle pass thro the defective fence of B into B's close & then thro the defect of C's fence into C's close C may have trespass against B— for C is bound to fence against such cattle only, as B should put into his close—But C may have case against B. 5 Ba 189 Saul 161 1 Brown 379.

Pleadings

When the trespass consists of the abuse of an authority given by law it is suff. to state the trespass generally in the declarn. & if Defdt. justifies in his plea—the particular injury or abuse comes out in the replication:— Ex. Trespass for breaking house taking goods &c: justification of the entry—replication stating the subsequent wrongs particularly by new assignments Ej. p 405 Sal 221 Bull 81 3 Bl R 2092 Pr. 479 5 Ba 213—

Pff may include several trespasses in one declarn. Ex. Cutting trees—breaking his house &c & to show how aggravated the trespass was & thus to aggravate damages Pff may join in his declarn wrongs for which he could not maintain an action. Ex Breaking & entering his house & beating his servant Ej. p 407 Sal 119 F.N.B 19 b Stra 81 5 Ba 192 Sal. 642 4 Ba 12 Burr 1114 1 Sid. 225 Cro J 664— Carter 10 Co 130 Pr. Reg 21 qu— Can the beating of servants &c with a per quod be joined in this case? 4 Ba 12 Ej. p 407 Str. 43. 202 Carter. 193 & 349. 348

It may be joined when it can be treated as part of the same transaction - As in case of a servant injured in "per quod" &c - It is only a continuance of the same trespass But if one break my house at one time & beat my servants at another they cannot be joined. & if no per quod is laid there can be no recovery for loss of service & no evidence of it should be admitted. Bat 642 161 P. 386 8 Mo 133 9 Mo 113 1 Bamm 346 2 East 154

The day laid in the declar.n is not material - trespass may be proved on any day. Esp 407 1 Burr 283 Cro E 32 - L 201. n Carp 456 Ind L 201 n. 8 333 8

So the action may be brot against several for a joint trespass or against each separately in a separate action 5 Bar 185 - Bam 420 8 E 159 Esp 347 .. L 202

But it is said that if it appear upon the face of the declar.n that a certain person not sued was party to the trespass with Deft. the declar.n is ill / 5 Bar 192 1 Leon 41 Ho 164 199. / See qu. as to this principle - not law Semb. 1 Bamm 291 Bat 32 6 Mo 766 - L 202 good after per cent / 2 Johns R 365 / 4 St.

It is agreed however that if the declar.n charge the wrong to have been committed by Deft.s together with another person to Pff unknown it is good / 5 Bar 193 1 Leon 41 / But it makes no difference on principle whether those not joined are alleged to be unknown to Pff or not - The practice is to take no notice in the declar.n of any party to the trespass who is not joined as Deft.s - & there is no need of mentioning any other than the Deft. for the act of one is the act of all -

If one take my goods & carry them on his own land I may enter on the land & take them again 16 Mich 154

2 Saund 399 n1

specially alleged in the declaration - as - no trespass and

A man's dwelling house is his castle for the protection of his person family & goods & by closing the outer door may prevent sheriff from entering to execute a levy on his goods & levy made by seizing the table without consent of owner the he be absent is illegal & a guest may resist the removal of goods thus seized
4 Hill 437. 12 Pick 270

per the act of one is the act of all —

Pleadings. Trespass to things Real

The trespass must be laid to have been done with force & arms & against the peace - these at C.L. are matters of substance. / 5 Ba 191 4 Ba 11 2 Ba 506 Sal 636 40 Sh. N.B. 196 Ca Ath 390 bb. / for on conviction of a wrong committed with force Deft was at C.L. fined - judgt. or capiatur - Semble if the wrong was not forcible - Ch. in actions on contract & on the case - judgt. here was a misericordia Deft. amerced. 2 Ba 506 5 Ba 191

By 16 & 17 Car 2 the omission of these words may be amended after verdict - but the declaration is ill on gent. demurrer 5 Ba 192 Sal 636 Esp 408

Now indeed by 5. W & M. the capiatur pro fine is taken away & thus the difference in the judgt. in the second class of cases is taken away - The Pff on signing judgt. pays 1/8 for fine & recovers it back as costs from Defn. 5 Ba 190 2 Ba 507

One holden by L. Holt that since the St. the words vi et armis are not necessary - not law Semb - the words are still necessary in Engd to let in the provisions of the 5 W & M - B.R. 985 5 Ba 191

In Ir. the words are not on principle more of substance - no fine - no capiatur - no difference in the judgt. - no such St as the 5. W & M - One decided by S.C. that a declaration omitting both set of words was good on special demurrer Bonnetties v Phelps 1796 Sedgw - writ of error prayed out but not prosecuted -

Gent. rule - The injury for which trespass is brot must be specially alleged in the declaration - i.e. - no evidence can

be given of any particular wrong for which damage can be recovered unless it be specifically charged. Eg. For breaking house & alia enormia taking & carrying away goods not provable. 5 Bac 194 1 Bac 225

This rule is relaxed when the action arises ex turpi causa to avoid indecency 1 Bac 225

The declarn must state the value of the thing for the taking or injury of which the action is brot. 5 Bac 196 1 Bac 39 2 Bac 230 430 Esp 407 Lo. R 113 Plead Cyc. 488. Cy. ...

But it is not necessary in all cases to state any quantity Eg. Cattle eating peas &c / 5 Bac 196 Cro J 130 / & the omission of value is aided by receipt - 4 Burr. 2455 Esp 407 Cro J 130 -

But the omission of value is aided by receipt. 4 Burr 2455 Esp 407 Cro J 130

In trespasses of a permanent nature where the injury is such as to be capable of renewal or continuance & where it is renewed or continued on diffr. days Pff may recover for the whole in one action bring with or continuando - or he may bring a separate action for each day's separate injury - 3 Bac 212 5 Bac 197 2 Roll 545 Lo. R 240 Esp 407. 17 Del. 538 Cy - 320

Saying the action with or continuando is alleging the injury to have been committed by a continuation from one day to another. 3 Bac 212 5 Bac 197 Lo. R 240 B. Mary 391 2 Litt. Ent. 444 1 Saund 23 -

te in facultie?

the injury in the fact shd be stated directly & positively & not by way of recital — a decln beginning "for that whereas" or "therefore" is bad on special demurrer 4 John 112. 1 Ch. 574 2 do 367 n Stra 622 n 681 1151 (Croutier Bar. Plead. B 11 2 Lev 206 Salk 636 Stra 621) 2 Ld R 1413 2 Lord 303 1 do 99 — 2 Mod 358. that the defect is aided after verdict — and vid 2 Hen & Munf 595 3 do 127. 271 that the defect is not cured by verdict —

Bl Rep 391 2 Litt. Ent. 444 1 Bennd 27 — 11

The trespass which may be laid with a continuando must be capable of renewal or continuance. 3 B/242 Esp 407

But when the several acts of trespass terminate in themselves or being once done cannot be done again or continued they cannot be laid with a continuando tho committed on several days – as killing several horses – But in these cases the several trespasses may be laid to have been done "at divers days & times between such & such a day" not continually. 2 R 230 Esp 407 3 B/242 1 Bia 319 2 Roll 549 Sal 638 5 Bac 198 2 R 828

But if several trespasses are charged & only one day is laid in the declarn. no evidence can be given in respect of the acts done on one day. 2 R 240. 976 Esp 408 Sal 639

There are two ways of declaring with a continuando –
1. The trespass may be laid with a continuando for the whole time – from such to such a day & this mode is proper when the trespass was continued without intermission for a longer term than one day. Ex. Cattle continuing on land several days. 5 Bac 197 Co Lit. 361 Com Dr. B 2.

2. Where the several acts are not committed in continuity but by intervals & on diffr. days & divers times – they should be laid by continuando on divers days & at divers times from such day &c – but the particular intervening day need not be laid – Ex. Destroying herbage on diffr. days but not continually. 5 Bac 198 & 2 R 240 Co. Lit. 348. 58 – Qu. Is this distinction attended to in practice?

Trespass to things real

When there has been an ouster & re-entry the ouster & all the acts done under it may be laid with a continuando - the trespass by Deft. having been continued - & if after re-entry Pltff has been again ousted & again re-enters he may lay the whole with a continuando Esp 408 Cro E 182 2 R 975 Sal 638 / or the Pltff may set forth the ouster & the whole come specially. 2 R 977. Pl. Eqt. 502

If trespasses which cannot be laid with a continuando are so laid the declar.n is ill even after verdict. Esp 408 5 Ba 199 Sal 639 1 Lev 210

But if some of the trespasses laid with a continuando may be so laid & others which cannot the declar.n is good after verdict tho the damages are entire - for it shall be intended that the damages were assessed only for the former - It is good also on demurrer as some of the trespasses are well laid & so a suffict. cause of action alleged - qua. d. this court on principle. 5 Ba 280 3 Lev. 94 1 Sia. 373 2 Show 196 Sal. 639 2 R 200 39 40 Esp 408

Not guilty is the gent. issue in this action. Esp 411

If a person indicted for trespass has confessed & the entry of his confession has been made upon the record he is forever estopped to plead not guilty to an action brot for the same trespass. Esp 411 2 Show. 833 -

Ct C. 3 a special justification must be pleaded specially not given in evidence under the gent. issue - for the gent. issue denies the facts - a justification admits & avoids them. The

If Def. justifies at another time & not at the time laid in the declar^n. yet if it be averred to be the same transaction his plea is good in sub. stance. 2 Saund. 4 b. 1 Bid. 162 1 Vent 93 2 Rich. 6. 8. 676 even without a traverse of the day laid in the declar^n. (2 Saund 5 n a) & a traverse of the day laid would be ill on special demurrer 2 Salk. 1457 1 Bulst. 138 (See Lee 228 day laid not material) T. Jones 146 Stra 694 See also Cro Jac 122 123 1 Saund 13. 14. 22. 209 812 2 Sal 641 642

Mere Justification is a good plea to trespass - see

As the time here is not material in Evidence 599, neither is it in pleading so the plea should follow the day here in the declar. 1 Saund 14 But if the justification make the time material a'st every P. in his replication may vary from the day here in the declar. without a departure 2 Saund 5 a b

A Dft under the gen issue may give in Evidence title or prove in himself a there under whom he claims - 1 Burr 239 But when the act appears prima facie a trespass any matter of justification by virtue of any authority or any government must be pleaded or notice given 1 Lut 283 a 1 Ld 492 2 Saund 402 n 11 Mod 132 — 7 Mod 387 —

8

denies the facts - or justification tempts to decide, than if the

evidence is inconsistent with the issue / Esp 411 1 Burr 282 Stra. 61 Ld Ro 732 Sel 287 / Sems under N. Ct.

But Deft. may give in evidence under the gen.t issue a lease for years - for this disproves the material allegations in the declar.n - So on gen.t issue Deft. may prove that he is tenant in common with Pff. - for the action does not lie between tenant in common - But that Pff is tenant in common with a stranger to the suit shewes he plead in abatement. Esp 411 2 Ro 11 b/b Sel 4 Bro. pr. Pais. 207. A

A Sheriff may justify under final process without pleading the judg.t - i.e. when the action is against him by a party to the judg.t - for he must obey the court - But if the action is brot against the Pff in a former action or a stranger he must shew the judg.t as well as exn. - for the judg.t may be reversed & if he takes exn afterwards it is at his peril. The Pff. in the former action is privy to the judg.t. A stranger being a volunteer acts at his peril - Ex. Ben Cattr. Esp 411 Sel 408 3 Lev. 20 vide. Esp 419 Ld Ro 733

Any person acting in aid of an officer at his request may justify as the officer may do - but the request is traversable Esp 412 Sel 107 407

If the action be brot by a stranger against an officer acting under an exn. he must shew the judg.t. Sems if brot by Deft. in the exn. Ex. Sheriff breaks the house of A to arrest B - A brings trespass Esp 419 Burr 2 b 31 Ld. R 705 Ld R 733

Accord & Satisfaction is a good plea to trespass - but

Trespass for breaking the outer door of a certain Pltff's dwelling house. Plea justifying the entry by virtue of process without averring a demand of admittance before breaking the door is bad both in form & substance 22 C.L 406

If one enter another house with force & violence the owner may turn him out using no more force than necessary without a previous request to depart sans if he enter peacably 11 C L 297. In the first case in addition to the plea of molliter manus a special justification stating the circumstances & the plea of son assault should be pleaded 8 T R 78. 11 C L 298

action below is not - 9 Co. 80 Hob. 373 Cost. 19 Esp. 419 Burr 2631 ~~Bl. R. 701 Str. 733~~ - 1 Roll 128 Skin. 391

Award of arbitrators is a good plea. Esp 415 Bro & Bb

Release is a good plea in bar - but if a release before action but is pleaded there must be a tender that he is guilty after wards & before action brot. Esp 415 Ral 222 Cro 104 Poll 229

Same if the action be brot for a joint trespass a release to one is a discharge of all - each is answerable for the acts of the other & a release of one is a release of the trespass. Esp 415 Hob 66 4 Ba 282 1 Saut 232 5 Co 97. Bro & 444 4 Mod 370.

But if the action be brot against two who never in pleading & one is found guilty & damages assessed Pl may enter a nolle prosequi as to the other. Esp 415 Ral 70 Bro & 211 No discharge the suit against the former is at an end - recovery bar 4 Ba 282.

Now settled that a nol. pros. may be entered as above in the earlier stages of the action & that the other Defts are not discharged - it is not in the nature of a retraxit. Saund 207 Bro. & 237 Carth. 19 Wils. 90

So if Pl has sued one only of several joint trespassers & recovered judgt. against him, this is pleadable in bar to an action afterwards brot against the others - for Pl can have but one recovery. Esp 416 Bro & 30 4 Ba 115 Bro. & 373 Lutw. by Lutch 216

By 21 Jac. Defts may plead in bar a disclaimer & that the trespass was by negligence & unwillingly - & tender of satisfaction amends

commence before action brot. But he must plead what was bailed - The St extends only to cases of involuntary trespass & disclaimer. Esp 416 Sta 349 2 R 811. 2 R 570 Sal 88 b. No such St. in Ct.

St. Limitations is a good plea in bar - 6 years in Eng by 21. Jac 1. - 3 in Ct by St. 273 - Specially pleaded in Eng - may be given in evidence here. Esp 416 St. Ct. 273 -

Plea of title in trespass amounts to the gen. issue & therefore not allowed - but it may be specially pleaded by giving colour 3 B 1209 4 Ba 102 3 T. 208 10 Co 90 1 Saunders 51 12 L 30

In Ct. special plea of title is warranted by St 582 42 b - tho it may be given in evidence under the gen. issue. St. 582 - For the numerous provisions of this St see St 582 42 b 2 Sw 80

As to new assignments vid. 3 Bac 213

A verdict or judgt. when given in evidence under the gen. issue is no estoppel tho good evidence. Sw. 4 21 3 East 346. 65

Evidence

The evidence must follow the issue - i.e. no matter going to the merits but not embraced by the issue can be given in evidence. Esp 419 3 B 1 1065 3 Burr 1885.

But the gen. allegation of "alia enormia" Pff may give evidence of any matter of aggravation which will not itself support an action - i.e. on the gen. issue. but no evidence can be given of a fact which would itself support an action

If the declaration be good without naming the locus in setting out the boundaries of deft's plead bilanum tenementum in which pltff takes issue instead of new assigning deft. Otherwise he must judgt. if he have title to any land in the town where the premises are alleged in the declaration to be situate 8 Mass 476 1 Saund 299 b 1 Cb 565. 6 13 Pick 649 10 Ct 522

22 C.L. that proof under a plea of bilanum tenementum that both parties have a claim of the same name will not prevent the Off from recovering without a new assignment — see 11 East 51 15 do 235

In an action of trespass against six & a joint trespass is proved against all & then Pltff go on to prove a distinct trespass against three exceeding to connect all but fail in so doing the other three are entitled to an acquittal before entering on their defence as the Pltff should be taken to have elected to go against the three only 14 b.L.472 but if the Pltff attempted to prove but one act of trespass against all & failed as to three they other three are not entitled to an acquittal until they have gone through the defence 14 b.L 472

for Pff unless it is alleged. Esp 415 Tid 225 Burr 1114 Pr. Prac. 21

If Pff. sets out the abuttals of his close he must prove them as laid — but if any abuttal is laid to the E. proof that it is N. E is suffn. Esp 415. 2 Roll 69 Yelv. 114

When the action is laid with a continuando Pff must confine his evidence to the time laid — for it enters into the description — but he may waive the continuando & prove a trespass on any day — or he may give evidence of only part of the time laid with a continuando. Esp 415 Bull. 86 —

When it is thus laid Pff must prove a seventy — or he can recover for the first entry only — this rule holds only where the Pff was been ousted. Esp 418 Str. pr. pais — 232.

If Pff make a new assignment & the defdt. if he pleaded to it he cannot prove defdt. guilty of the trespass at the place mentioned in the plea in bar — for that is waived — i.e. when the trespass newly assigned is alledged to be at a diffn. place from those justified. Saunes 241 164 & they are generally so alledged tho not always. Bendl. Saunes 164

If they were how could one be made a trespasser by relation; by need assignmt. when the acts are justified & those newly assigned are one transaction. Ex — Entering a house & breaking furniture. 3 Bl R 29 8 Co 146 —

If on a plea of justification defdt. proves so much as amounts in law to a justification it is suffn. tho he do not prove the whole as pleaded. Esp 416 Yelv. 148 —

799 Evidence. Trespass to things Real

When the action is by a stranger to an exn against a Sheriff who acting under it has committed a trespass the Sheriff must shew in evidence a copy of the judgt - Semble if by a party to the exn - Cro by Ch J. in it - Esp 419. 11 East 733 Burr 2631 1 Str 701 -

As to removing damages where there are several Defts. ind - Esp 420 - Ofnutt & Battey

For costs ind - St. Ct.

Real actions at C. L. - ind 3 Bl 291

Pff. is not bound to the time laid in the declar. nor the Deft to that mentioned in the plea - for Pff may give evidence of any trespass before the commencement of the action 1 Saund 283 a / & Deft may prove his justification on any other day 2 Saund 5 a -

cancel.

Persons owning land on diff.t sides of a private stream
hold to the center, or middle of the water 6 Cowen 518
& if there is not a sufficiency of water for works on both
sides each is entitled to an equal share of the whole
Paige 448 & if it is necessary to excavate the bed
of the river so as to give each his share it must be
done under the direction of the Court or in
the mode adopted in Martin v Waller 2 Mood. & R 144

Statute Limitations. 1545.

Doctor to make a specific restitution Benefits of Bones also

The surrender of the land of an infant to a third person by his guardian is a disseisin 1 Johns C 213. pu —

A Disseisin in fact is induced by the wrongful entry of a stranger & the expulsion of the true owner or some act equivalent thereto as a conveyance by the tenant in fee. 7 Wend 203. 2 Bl 345 5 Cowen 371. 6 Johns 197 — By this species of disseisin the wrong doer will in time acquire a perfect title —

2d Disseisin by Election is when the owner may consider himself disseised for the sake of the remedy by certain of moral disseisin but of he does not elect to consider himself then disseised the freehold is not divested but remains in him 7 Wend 201. Co. C 302 1 Cr. R. 92.

Ouster and remedies for it Ejectment and Disseisin

Ouster is an injury by which a tenant in fee of land he is wrongfully removed or turned out of it. 3 Bl 167 109.

The word "Disseisin" denotes an ouster of the freehold.

The word "Disposession" an ouster of an estate less than a freehold. 3 Bl 167 199 1 For the diff. species of ouster see. 3 Bl 167.

Ejectment

This is an action by which Lessee for years, when ousted of his term recovers it from the wrong doer together with damages 3 Bl 199 Lis 427 2 Ba 160 5 Co 105 Cro 77.

The action of Disseisin in Ex. is an action by which a person disseised or ousted of his freehold recovers it from Disseisor together with damages - Not similar to any that is known - at C.L. - It is strictly a mixed action & so is the action of Ejectment called the it does not exactly correspond with the definition. 2 Ba 160 Boyl. 68 Cowp 250 3 Bl 199 118

Eminently off. in Ejectment recovered damages only no restitution was the if ousted by Lessor he might recover the poss. by an action on the cov. for quiet enjoym. - but if the ouster was committed by a stranger Lessee had no other remedy than by Ejectment in which he recovered damages only - the Lessor might in a real action recover poss. of the freehold 3 Bl 200 15 Ed 3 tit 120

Afterwards when the Courts of Eq. began to compel the ejector to make a specific restitution Courts of Law also

adopted the same method of doing justice by rendering judgt. for the recovery of the term & issuing a writ of possn. - tho the declarn. still demands damages only according to the old rule - 3 Bl 200

In Ct. the land is demanded - Lots necessary in 1 Root 438.

This practice of the Eng Courts appears to have been adopted as early as the reign of Ro 4 - since that time the remedy has been specific / 3 Bl 201 / & for a long time past this action tho founded nominally upon the ouster of ates in only has been in Eng the common & almost only mettion of trying the proprietary title to real estate - It has been used for this purpose ever since the reign of Hen 7. 3 Bl 200 5 2 Ba 160 1 Burr 667.

This is now done by a string of legal fictions which are delineated in 3 Bl 200 2 Ba 160

No such fictions in Ct. the freehold is recovered directly by Ejectment

Since the action has been thus used to try the legal title the the damages recovered in it are usually nominal only - In real actions except in ofice no damages are recovered. 3 Bl 205 187. 21 2 Ba 181 13 Mass 257.

For what things Ejectment lies

This action will not lie for any of which the Sheriff cannot deliver possn. under the exn. or for anything on which an entry in fact cannot be made. 3 Bl 206 Croke 492 Brown. 102 2 Ba 166. Salm. 29 Croke 1 116 - 8. Mod 277

A. owns the upper & B. the lower mill on the same stream
B's dam obstructs the use of A's mill. B. raises his dam 2 feet &
suffers it thus to remain 38 years whereby the obstruction to A's
mill is removed. B. then sells his mill to A. who then owns both
A. then sells the lower mill to C. It was holden on the ground
of unity of possession in A. that the right to raise the lower
dam 2 feet was gone & that the upper mill had acquired a
right to use the ~~back~~ water without back flowing 3 Mason R 92
& it was holden to be generally true that if one owns an estate
& the other an easement upon it & both easement & estate become
vested in one individual such easement is extinguished — but in the above
case if the dam had never been raised C would have had a
right to use it at its original height to the prejudice of the upper
mill which 18 Pickering 166 Amory v Fryot. Geo I 121 Nicholas v
Chamberlain — Where A. built a house & conveyed water to it
pipes from a diff. part of his land & afterwards sells the house with
its appurtenances excepting the land & sells the land reserving the
house the pipes pass with the house — Morris & Edgington
3 Camp 34 that the right to a natural water course is not
extinguished by unity of possn in any case —

Whenever a right of entry exists & the interest is tangible so that posn can be delivered Eject will lie 9 Johns. R. 298

To recover on a mere possessory title there must be real substantial evidence which is clear, positive & notorious an actual occupancy: a possessio pedis or it is not an adverse posn. Ex. Cutting wood by felling trees & keeping them on another around the land called a possession fence is not suffn. 2 Johns R. 230.

A mere contract for a deed tho the purchaser enter under it does not place him in a situation to hold adversely till he perform the condition of the purchase by paying the purchase money - such posn not being hostile in its inception 1 Cowen 610. 6 Johns R. 46. 4 do 230.

In gent. therefore it will not lie to recover incorporeal hereditaments or things lying in grant merely. Esp 428 Bull 99 2 Bu 166 Stra 54 Cro J 146 Selw 729 Bac 780

But it will lie for tenements held out for a highway in fee of the owner of the soil - for laying out a highway does not divest the right of soil but the land is reserved subject to the easement Esp 390 428 1 Roll 118 3 Bu 54 Stra 1004. Selw. 728 1 Burr 133. 143 1 Root 49 Cro Dacy

But it has been resolved in Ex. that town proprietors cannot recover a highway in Ejectment - Stiles vs Curtis - C. E. 1810 S. E. 1809 contra 1 Root 118 The Judge gave different reasons - I cannot comprehend it & do not believe it to be law -

So it lies in favor of the grantee or owner of the hedge of land tho the soil belong to another for the profit belongs to another the former till the crop is taken. 2 Bar 167 Cro E 112 or 162 Stra 1120 Ld and 303 401

But it lies not for a watercourse or running - for it is fluctuating & profit cannot be given - It should be brot for so much land covered with water. 2 Bar 167 Yelv. 143 Poyle 167 3 Bl 18 Brownl. 142. Selw 729 1 Sw 212

Neither will it lie for a fishery. Selw 729 Cro J 146 Cro E 492 8 Mod 277 - contra 1 Brownl 142 1 Bl 236 1. for Celebrated J

It will lie for the profit of an entire thing. Esp 428 Stra 695 Selw 728

For other cases, in which it will & will not lie see Selw from 727 to 730

Ejectment

Who may have this action

No one can maintain this action unless he has at the time a right of entry – the action being founded on the right of poss.n. for the Lessor of Pl. is supposed to have entered & mere a have got the fiction will not aid him nor would an actual entry if he had no right to enter – for the possessory title is tried only in Ejectment. 3 B 1205 Esp 430 4 Br & Ones 19 b – Litt. s 595 3 B 1199, 91

The ultimate right of property in Lessor is tried in Eng by a real action by Servant in tail aliens in fee & alienations – it is a disconvenience & the heir cannot enter – of course he cannot maintain Ejectment – this remedy is by a real action. 3 B 191 Litt. 595 Esp 431

So if Lessor of Pl. or those under whom he claims have been out of poss.n 20 years in Eng. while having the right of poss.n he is barred of this action by St Lim.n 21 J. 1 which takes away his right of entry or possessory title. Esp 431 3 B 1206 2 Bos 160 7 T Rep 182

Pl. must prove poss.n in himself or those under whom he claims within 20 years – Def.t need not plead the St. Lim.n. Runn. 234 Burr 119

St. Ch. 254. 434 limit the right of entry to 15 years after the title accrued & also bars all right to that time, & both St. contain the usual savings in favor of Infts. feme Covts. persons insane imprisoned or beyond sea / St. C 435 / In Ch. 5 & in Eng – 10 years are allowed after disabilities are removed. 3 Bos 503 –

Decided in Eng that successive disabilities cannot be joined within the saving clause so as to prevent the St. from attaching Semb. 80 6 East 80 4 M & S 182 Coates 4 Cow 298 Scott 805

Does not lie by one already in posn 26 Ames R 355

5 tenants in Common 3 occupied part of the lands jointly & 2 occupied separate & distinct parcels in Ejectment against all on a joint plea of not guilty it was held that Pltff having sh a joint ejectment & trespass was bound to prove it - the plea dis not aid him - that he could have judgt only against the 3. who occupied jointly 2 Johns 441 Jackson vs Hasenclever -

Where Pltff claims the same title to all the premises he may join in the same suit whether they hold jointly or not - each is to be found separately guilty as to the premises in his posn & judgt agt - each according to the verdict 7 Wend 157 5 do 96 5 Johns 278

In Ejt by Tt. Ejt may be maintained against one not in posn but who claims title to the land those being none in posn 5 Hill 50 12 Wend 558 21 do 467

... since a prop - posn years and with it a complete

Whether a lapse of any particular period of time is necessary to presume a dedication of land for a highway - dub. Mr J. Chambre 5 Taunt 137. that it does not. Matt. on Prescript. 318 2 Stra 1004. 1 Camp 260 - If the owner of the soil throws open a passage & neither marks by any visible distinction that he means to preserve all his rights over it nor expressly forbids persons from passing through it he shall be presumed to have dedicated it to the public

But time in such cases is considered an important feature in the case 2 or 3 years insufficient to raise such presumption Stra. 909 - but 6 & 8 years holden sufficient 11 East 376 & see 5 Taunt 112 5 Bar & A. 454 7 John 106

A is a good defence to Ejectment that landlord after the lease conveyed his title to the premises by mortgage tho, there be no interest due on the mortgage & the mortgagee have done nothing to affect the rights of deft 27 C L 268

If the tt has begun to run a supervening disability will not save the title – the disabilities in the proviso of the St being only such as exist when the right of entry first accrues. 4 Bl R 300 6 East 83 –

The poss.n or entry of Lessor of Pff. under the Eng. St. must be an actual poss.n &c. – not presumptive – so that if he cannot prove a poss.n in fact within 20 years he must be nonsuited. Esp 432 Bull 102 Stra 1142 Sal 421 – / qu if no other person has been in poss.n – for then there has been no ouster / 3 Bl 206 / Semble – he can recover

In case of a current poss.n no one will be let in to a pen. Esp 453 Bug. 1241 vide Dunn. 148 Bl R 357 Dougl 95 1 Barnes 122

In Ct. a right of poss.n is deemed equivalent to actual poss.n provided there be no stranger in poss.n – for there is no ouster – so that here a right of poss.n is suff.t ground on which to bring this action

If the owner being Ejectd. within 20 years after ouster is nonsuited that does not prevent the St. commencing – to prevent a bar there must have been an actual entry within 20 years. Esp 432 Bull 100 1 Saund 432 and 1 Root 155 – 2d 7

Non ouster to poss.n for 20 years in Eng – or 5 in Ct is not only a good defence to the action but also a suff.t ground on which to rest it / Esp 482 7 Bl R 492 Doug 741 1 Burr 119 Dunn. 58 1 Burr B.R. 451 3 Bar 504 Sal 421 Holt 264. / For the possessory title is acquired by mere poss.n

In Eng – poss.n for 20 years confers the possessory title only but does not affect the ultimate right of property / 3 Bl 179 90 Esp 449 /

In Ct. such a poss.n for 15 years ripens into a complete

absolute title - This I suppose is upon the principle that he who has the title has without entry the posn. in law - when the legal posn. is lost the title is lost with it. 1 Root 50 68 151 412 1 Bin. 383

is to enter at the election of him who has title, vide Burr 111 Cro E 303 Runn. 53 -

Principle enters in continuity in Ct. Ban Ejectmt. - for Pff must have been possessed within 7 years - qu - does not this confer a title on the last disseisee so that he can maintain the action? Burr 2483 Bull 102 Cand 491 E. 481. Lice. 8 John. R. 137. Antea 803 4 Ct. 95 9 Conn 655. 1 Jam. 156. 2 do 22. 250 444. 3 do 230. 10 do 477 - L. 243 n 9 Pick. 256 28 E. L 405.

But the posn which ban an ejectmt. or gives a title under the St. - is an adverse posn. - if not adverse the St. does not run. Ex. Cs if one joint tenant or tenant in common is in sole posn for 20 years it is no ban to the other - no disseisin - no ouster - so if Mor remain in posn as mor for 20 years - 2 Bac 171 Esp 433 Sal 423 Ld R 140 Sel. 285 Burr 2604 1 Brnt 195 3 East 297 Selw. 705

In these cases there is no presumption of abandonment & no disseisin or ouster but adverse posn by one tenant in common is "ouster enough" - Bac 218 Sal 423 - E. 433 -

If therefore one joint tenant or tenant in common adverse to hold the whole estate by posn - he must prove an adverse posn for 20 years - seems his posn is in lieu that of his companion - Esp 434 1 Brnt 242. 96 Burr 2604 2 Bl 682 Bull 102

But what shall be deemed an adverse posn in such cases is a fact for question for the jury who may presume an ouster from

In B. & C. the S. does not begin to run from the time the tenant commences possn but from the time of his holding adversely 3 Johns Ch 124 9 Q.B. 165 — So Semble here.

§ 502n

An entry common to the lawful proprietor is not to be presumed but must be clearly proved 3 Johns Ch 124 8 Johns R 220 9 Q.B. 165 § 506 qu.

Where one enters under a void deed disclaiming title except by his deed his possn is not adverse 7 Mass 152

Yet he has recognized upon as Landlord he cannot afterwards dispute his title. 1 Cowpers R 414. 394 2d. 215. 7 Johnson R 186

As Tenant. where deft. possesses no written title but relies solely on poss. with an assertion of title he can retain so much only as he has in actual improvement — by a written or substantial analogue 158. 2 do 354 1 Cowen 609 7 Mend 65. gen 9 Cowen 589 — 8 Mend 440 9 do 516

To constitute such adverse poss. as to be a recovery or convey a clear subsequent grant by the true owner the entry must be bona fide — relying on title — the party must believe the land to be his & that he has title to it tho such title be not rightful or valid — but if the title be an absolute nullity as if the deed be obtained by fraud or forgery or from an agent without authority & this known to the party it will not serve as a foundation of an adverse poss. 9 Mend 511 — 1 id 13 & 227

great length of sole prop.ty. Ep. 434 Cowp. 217.

If the party in poss.n claim under the party out there is no title acquired by the poss.n - for it is not adverse & of course the owner is not barred. Ep. 434 1 Bull. 103 1 Rod 68. 51 Bryan's Reader Doug in 2 Bos. 542

So poss.n by particular tenant does not run against remainder man or reversioner - for his poss.n as tenant is not adverse. Cowp. 218

Where adverse poss.n is relied on by tenant at will there should be some proof of actual ouster - the preparatory evidence of the fact arising from circumstances may go to the jury - Ep. 435 1 Bull 104 1 Roll 659 2 Bos. n. contra

But it has been holden that tenant at will taking a lease from a stranger is no evidence of adverse poss.n unless the latter has actually made an entry - but qu. poss.n by a stranger under a claim of right is adverse. Ep. 434 1 Roll. 659 3 East 29

If the action be founded upon a clause in the lease giving a right of reentry for non payment yet the actual entry is not necessary to maintain the action. Ep. 435 Doug 400 Bull. 84 Ep. 441 1 Saund 314 1 Bull 103

Confession of lease entry & ouster is sufficient - the same formerly in ejectment appear to have been in the attorney. 2 Ro. 1 2 1 Saund 319 1 Sid 233 Want. 42 332 2 Rol 218 Sal 246.

And the last rule is gen.l. where an entry is necessary to complete the title - but when necessary to vest the title - or to avoid a fine - there actual entry is necessary - Doug 48 Ep. 434. 66 1 Saund

Ejectment

In the former case the right accrues upon the act event or contingency in the latter upon the entry.

The only person who can maintain the action is he who has the legal right of prop.ty. - Thus mortg.ee may maintain the action either before or after day of payment not only against the mortg.or but also against mortg.or subsequent lessee as well as against a stranger - & the rule is the same in favor of mortg.ee assignee & his assignee - Doug 21 Esp. 435 Bac 240 -

But if lands are afterwards mortgaged mortg.ee cannot evict the lessee - for his is the elder title - But in Eng. mortg.ee has been allowed in such cases to proceed against lessee by Ejectment if he has given notice to the latter before action brot that he does not intend to disturb his prop.ty - but merely to secure the rent - This has been allowed as the co-ercive means of securing the rent. Esp 435 Doug 23. 269 Cowper 88 Bac 2.

So mortg.ee may recover in Ejectment tho the mortgage money has been paid if it was not paid at the day - for he has the legal title. 2 Doug 158 Rand 214 1 Vern 187 2 30 159 279 Hard 318 1 Ch Ca 56 Eq. 1 Eq. f 328 Ld. Ster 413 Esp 458

Gen.l rule that the person in whom the legal title is should recover in Ejectment tho the equitable interest be in another or in Deft. himself - 8 Mod 2. 122 1 Ld 760 2 684 Bull 96 Doug 23 - 2 Salk. 321

But this legal title may under circumstances be presumed to have been extinguished. Bull. 110 2 Mod 696 7 349 8 122

In some modern cases courts of Eqy have somewhat relaxed from

A mon^ce is entitled to notice to quit previous to the bringing an action by mon^ce / 2 Johns R 84. 4 & 5 Terms of a lundrance from mon^ce - relationship of landlord & tenant does not exist between lessor & mon^ce / 11 Johns R 215 / & in all cases to entitle Deft to notice there must be a privity either of contract or estate. / 4 Johns R 215 / Between lessor & Deft. 8 Johns R 422. Contra 2 Ld R 1.

When lands in a state of nature are clearly described in other & the encroachm^t has been made by an adjoining proprietor & continued in possession of such encroachm^t & acquiesced in by the owner for any time short of the 40 Yrs the owner may have certain exparte improvements have been made during the time of encroachm^t when the owner it is seen is to be estopped 16 Wend 285 11 do 104 12 do 127 11 Johns 123 2 Cowen 146 202 10 do 362 7 Pickn 71 4 Johns 143 3 do 12 269 7 do 241 17 do 81

2 Johns R 221
8 " 487
3 " 422.

Co Eq. rev. St 448, § 1. all conveyances & bonds where grantor is declared are void the title bonds. must remain in trustee for only person bring the action for recovery vide. 7 Johns R 480. Id. 157.

To make property title in Defr or an adverse poss. not sufficient claim or title must exist and be suffn to enable him to maintain the action / 2 Johns R 22 Id 201 10 do 338 / Strict Ptff proof must be clearly proved / 3 Johns R 388 / payment of taxes & exp. of partition deeds not title —

Dangs. bb

Eq. equitable claim which is doubtful cannot prevail against the legal title 7 Johns C 221 3 Johns R 423. 8 do 487 2 do 221. 5 East 132 8 JR 118 10 do 755 — 1 Hill 441

the gen.l rule & take notice of trusts or equitable rights under special circumstances - But the principle of these cases have been questioned & denied properly - for whether it is expedient to have these separate jurisdictions is not now the question - they have been established for ages & for Courts of Law to meddle with purely equitable estates breaks down the wall of partition between them & invades the rights of Chancery. Cowp 473 397 Doe 22 695 747 1 Ves 582 735 2 Bos & Pul 347 563 1 Ves Sr 334 447 8 Ves 516 Cliff. 5 112 Rich. 378 Esp 458 7 Cont 23.

In Ejectment Pl. must recover by the strength of his own title not by the weakness of Defts. of course a recovery may be defeated by proving the title in a third person, the title cannot be given when Pl. title is derived from Deft. or when Deft. holds under title derived from Pl. - in both cases a rule analogous to the doctrine of estoppel applies. Ejectment or Mort. or Mort. is his own lease after expiration of the lease. Bull 110 Esp 455 Burr 2485 2 Day 227 1 Ves 750 Sd 480 1 Root 222 Vice Chancellor 190n

Upon the same principle if B claiming under A leases to C in Ejectment by C against B after his interest is determined the lessee cannot attribute C's title. 7 Ves 488.

Devisee of a term for years may maintain Ejectment - but not in Eng. has assented to it - for the legal title is in the Ex. Esp 436 Burr 70 Cowp 288 Roper 190 1 Leon. 129 Pow. d 188 1 Ro 544 2 Ro 476 426

Consent of Ex. is not necessary in the Action for legacies always lie in the debts of C.S. tho of the legacy be not specified distribution in specie necessary in Ch.

Ejectment

But when a freehold is devised devisee may recover it immediately on devisor's death – no assent of any one is necessary – the Ex. has no concern with it & the heir's title is good. Ep 437 1 Inst 240 / Devisee has immediately the legal title. Pow D 190. 1 John. C 281

Assignees of a bankrupt may maintain the action for lands which belonged to him – for the legal title is vested in them by the St. Bankruptcy – Ep 137 2 Ray 70 1 Binney 175 1 Vels. 276

The committee of a lunatic cannot maintain Ejectment for the lunatic's lands – it should be in the lunatic's name – for the title is in him & the committee cannot make the necessary claim being only a bailiff or agent / Ep 138 Hob 216 Kitt. 16 2 Vels 130 Selw 27 /

The lease is made of the lunatic's lands by the committee upon an order of Chancery. 2 Vels. 131

In Ct. this action must be in the lunatic's name suing by his committee. St. C. 383 –

An Ex. may have the action for an action either of his testator or himself when testator was lessee for years – for it is a chattel interest / Ep 139 1 Co 95 2 Vent 29 / In of an term. 3 Ph. 13

If one be disseised of an estate of inheritance & die the remedy belongs to the heir – but he cannot claim title from an ancestor who never was seised. 1 Inst. 164 Pow D. 565 3 Ba 23 3 Bl 180 Id 209 1 Inst 11. B –

one entering into poss.n under a contract of purchase may not whilst he remains in poss.n deny the title of vendor - unless fraud or imposition has been practised on him he must first surrender the poss.n - 4 Maud 401. Semble as to an covenant 11 Pick 215 Ep B case is based with a right of way over W. land adjoining if tenant wants a road over the way he may gain title by poss.n

If a tenant holds lands by one title which is defective & can acquire them by another which is good such acquisition is not extinguished by unity of posn. 11 Peik 193

In Ct. the heir may support the action the tho ancestor made no mention of the maxim semper heres stipitem not being received here 38 Day 166

An alien cannot maintain this action - for he cannot hold lands 1 Ro. 439 4 Bl. 374 3 Bl. 249. 74 95 1 Brot. 32. 8 129 1 Ba. 480 1 Salk. 198 7 Co. 16 / So in Ct. of N.Y. / Edin. Ringold - Bit. "Alien" if born when naturalized under the U.S. laws. Hall R. / 1 d. 36. 6 74 4 Wh. 133 -

An alien having a term in a house may at C.L. maintain Ejectment for it 2 Bl. 293.

A lease for years may maintain Ejectment against strangers for before has the present right of poss. 3 Bl. 180 90 57.

In Ct. if several tenants in common in the action of Disseisin a judgment against one will not bar the rest - it is a disseisin - but if a release only made to Deft. the other may still proceed for their share. 2 Bac. 3

Tenant in common may maintain Ejectment against bailee considered as one actual ouster / Litt. § 322 Salk. 727 / So in Ten. in C. they may maintain a joint action of Ejectment 4 Cram. 165

In N.Y. Co. tenants may maintain separately this action Salk. 727 10. 1 Johns R. 231.

Pleadings

The declar. should state the title as it is & it should show a subsisting title at the time of action brot. If he have no

title at that time he has regularly no right of recovery - tho if he state a longer term than he has he may recover.
Esp 444 459 1 Bac 7 Hra 550 3 Wils 274 4 T.R. 480 Bull 105

But it is not necessary in the Eng action to state Pff entry on a day certain suffn to set out his title or claim & even that he afterwards entered / Salk 743 Bull 108 / for so are the precedents - besides the entry is not traversable - the Deft must confess & avoid entry & enter. Esp 446

Not necessary in ct. to state an entry by Pff. as in Eng - tho have no fiction - suffn. to aver that at such time he was seised, or possessed as the case may be / & that Deft. at such a time & period hereto - Not necessary to aver mesne & profits in the conclusion of the declaration - if it contains the usual allegation it is good 1 Day 134 Salk 113 n

The order should be laid as subsequent to the awarding of Pff title - seems the declaration discloses no cause of action
Esp 445 1 Bac 7 Bull 106 Cro Eliz 311 Salk 746

The particular day of the order it is said need not be stated in - no particular day need be stated. Esp 1145 Cro E 311 - Salk 746

Suffn if the order appears in the declaration to have happened after Pff. owned & before entered - but it is usual to allege a day certain - qu. is not the omission fatal on special demurrer?

The land or subject matter must be described in the declaration that the sheriff may know of what he is to deliver possession seems the declaration is ill. - Great precision was anciently

A grant of land conferring an entire title cannot be presumed from possn & length of time alone 2 Ct R 607

An entry into part of a tract of land with a claim to the whole is equivalent to an entry into the whole 8 Johns R 109.

An entry to avoid the St. of Lim. must be an entry for the purpose of taking possn 4 Johns R 390

To constitute an adverse possn there need not be a building fence or other improvmt — nor actual occupation cultivation or residence 6 Pet 513 Ricille v notorious acts of ownership with the knowledge of an adverse claimant without interruption suffd &c 16 Pet 52 praying the pos &c

After the first ejmt for possn has ejected the new one be obtained without a scire fac.? A party cannot enter by virtue of his judgt without ejmt 34 E.L 176. Now if his first ejmt has been invalidated can he have another without a scire fac. for cost might have a good answer 34 E.L 176

necessary but the rule is now relaxed. /2 Ber 158/ for the reason of Pff is to shew the land at his peril. 2 Ld Ra 1470 Cowp 350 Cro E 309 Cro E 471 Sal 254 Stra. 834 909 1 Bla 11 1 Lev 241 3 Lev 23 2 Ld Ra 191 Cro E 309 Esp 248 Stra 1063. 71 Selw. 246 n 25 Burr. 623. 2673. Ried 1 Salm E 101

In Ct. the subject is usually described by a designation of the town in which &c. & the boundaries or abuttals of the land together with a statement of the exact or estimated quantity. The quality of the land or the kind is not mentioned / scrutiniser the pencils is not necessary /

In Eng the boundaries of the land are not usually given. But the Pencils in which &c. the kind of land &c available & some certain quantity are required to be designated. Esp 446 Bl. R 705 Cowp 204 1 Ca 8 Ra 333 11 Co 55 Bull 109 Sal 254 1 Bia 295 3 Lev 23

If laid in a wrong pencils Pff cannot maintain the action Semb. So in Ct Semb. if laid in a wrong town - for the pencils is a part of the description of the subject matter & is not laid as a mere name. 2 East 497 501. Bl R 706.

But Pff is not bound to declare for the exact quantity that he is entitled to recover - for he may sue for a certain quantity & recover for so much as he proves a title to - even a misstatement of quantity is no variance - Esp 447 Cro E 13 2 Roll 734 3 Lev. 334 Cowp 200. Lamas 49.

But he can recover for no more than he proves a title to tho he may recover for less / Esp 447. 8. Burr 326 Ried 229 /

So if he declares for a longer term than he has he may recover - for the question is whether he has the preponderating title to the subject sued for. Bull. 106

The Deft. in Eng. has confessed lease entry & ouster he may still deny that he is in possn. & if Pltff cannot prove it he must be nonsuited - or rather if he cannot prove that possn. was in Deft. at the time of action brot. - Ejecting partitioners often overlook this point - Esp 453 1 Wils. 220 Bull 108 7 Mod. 327. 1 Bos & Pul 573 -

In Ca. also Pltff must prove Deft. possn. - but Deft. is not obliged to confess et supra

Gent. if you in Dispersion is "no wrong nor dispersion" 3 Bl 305

In Ejectment "not guilty" - 3 Bl. Deft.

Note nonsuing to plead St. S limitn. 1 Burr 119.

Special pleadings are seldom pleaded - for the common rule in Eng. requires Deft. to plead the gent. issue. Salk 76 Cro E 261 2 Ba . Mann 190 238 Yelv. 180.

Judgement on a plea of title in Trespass is no bar to Ejectment it being a higher action. Kirby 395 2 Saund 213 Str. 422 3 East 346 Cro. E 21. 178

Evidence

Pltff in Ejectment must recover by the strength of his own title not by weakness of Deft. - It is a good defence to prove a title

Ce declar.n in Eject. containing the usual allegations is good without demanding seisin & pdc.n in the conclusion 1 Day 134 for a form vid 1 Swift aff.t

The heirs declaration of a party in a joint-ownership to shew title out of himself to exist heir of the legal estate 14 Mass 482 (5 Gray) 6 Johns 22 7 do 186 16 do 302 6 Johns Ch. 166 6 Cowen 751 Dem. to shew the nature of the holding 14 Johns 230 2 Ld R 143. 1 Esp 6 458

not of ownership of Defts. It is a good defense to prove title

in a stranger. Esp 453 Burr 2484 2 Str. 719 4 Co 682 2 Day 227. Cute.

But the title proved in a third person must be a good & subsisting title or it is no defence. Ex. Deft. pleaded a made lease to a stranger - not suff. unless he proves possn. under it within 20 years - a supposed title is not suffn. Esp 456 Bull 110.

When a lease is void or voidable possn. may be recovered against lessee by this action - But it may be Pltff destroy his right of recovery by some act affirming the lease or waiving his right - Esp 464

Rule. If a lease be void it is in law a nonentity & no act of Pltff will affirm it or there is nothing upon which the affirmance can act - Ex. Tenant for life claims in fee - It is void - & acceptance of rent by the remainder man does not set it up Dang 50 Cowp 482 Esp 464

But if the lease be only voidable there may be an implied affirmation of it by the act of Pltff lessor. Ex Lease on condn. that if lessee assign without leave or rent the latter may re-enter. This is only voidable - hence acceptance of rent by him after notice of forfeiture is a confirmation of the assignment - a waiver of the condn. Esp 465 1 Burr 24 3 Co 64 Cowp 803 483

If Pltff sets out the actual terms of his lease he must prove them substantially as laid - but if an actual be laid E. proof that it is N. E. is suffn. Esp 467 Cute 111 2 Roll 677.

Ejectment

The St. Limitat.. is a good defence under the gen. issue Wms 119 Cents.

Verdict and Judgement

Pff in this action may may recover according to the title which he proves the diff.. from that laid in the declar.. Ex where having title for 5 years he declares for 10. Esp 447 490 Cents. 812

So if he declares for a certain number of acres & proves title to a less number he shall recover for the latter / Esp 490 Bouse 260 2 Ba 177 / So tho he declares for several things - Ex. a house & land he may recover one & not the other even tho the declar.. should be ill as to one it may be good & judg.. may be rendered for the other. Esp 490 Cro 2 186

If Pff declares for land only he will recover with the land all the buildings upon it they being included in the word "land". Esp 491 Dy. 47 2 Bl R 1 Just. 4

If Pff recovers judg.. he has a writ of habere facias possessionem under which the Sheriff puts him into poss.. & turns out tenants. Esp 492 Salk 258 3 Ba 178

In the exn. of this writ the sheriff may break the outer doors of a dwelling house if it be necessary - his return whether is recorded - for the writ cannot otherwise be executed if he is denied admittance. 2 Ba 179 3 Bag 91

The taking poss.. by Pff. pending the suit does not prevent his recovery in Ej. - he may still have judg.. for damages & cost.

Burr 339
Bid 239

If Pff has an good credit the Court will order him to take possn of so much of the premises as his own title to 1 Johns Ch 101

In Ejectment where prosecuted by cestui is shown at the commencement of suit presumption is that he entered & held in tenitity to Pltff right 4 Hill 116

recovery in Ct. - he may still prosecute for damages & costs

Ejectment

1 Root 78 Sent.

In Eng. it may be pleaded in bar - but after issue joined it is discretionary with the Judge to admit the plea or not. I do not see the propriety of permitting this to be pleaded in bar as it does not go to Pff whole claim. Esp 454. 1 Salk. 180

So if the term for which the action is brot expires pending the suit Pff has judgt. for damages & costs - for the trespass remains - but he cannot recover possn. Esp 492 7 R 328 Stra. 1056 2 Ba 177 1 Burr 285 Ream 404 3 Selwa 249.

If after Pff is put in possn. Deft. turns him out Pff may have a new hab. fa. possn. or an attachment against him for a contempt. Sem if entitled by a Stranger. 2 Ba 180 1 Peak 779.

In Eng. if verdict be for Deft. the Court will seldom if ever grant a new trial - for as Pff may bring a second action there is no necessity of a new trial. 5 Ba 253 4 Burr 2224 Stra. 1106 1 Barnes 323 Esp 493 Peake. 238 / the judgt. in the first is no bar - for by the fictions on which it is founded a new casual ejector as well as a new lease & ouster may be laid in each successive declarn. Ream. R -

But if verdict be for Deft a new trial may be as easily obtained as in any other action to prevent the change of possn. - & possibly Deft possn. may be his only title in which case his bringing a new action might be of no avail to restore him to possn. tho the Pff should ultimately be found to have no title 5 Ba 254 4 Burr 2224 It was formerly held that a new trial could not be granted in any case of Ejectment - not law. Sect 648 Sd Rs 514

× In N.Y. a recovery in Ejectment does not prejudice Defts. right if he may bring ~~a new~~ his action & recover according to the rule set which he had before the recovery agst. him. If Deft. suffers judgt. by Default & is turned out. he may bring a new action & recover on the strength of his former propn. /3 Johns R 2 69/ qua Lagen

× In action for mesne profits is an equitable action & will allow of every kind of equitable defence /2 Johns Ch 438/ But no defence can be set up which wou'd have been a bar to the action of Ejectment. 3 Johns R 481.

If after the termination of a term the tenant holds over Ejectment & trespass for mesne profits will lie agt him 8 East 358 1 W R 159 10 Mod 355

Ejectment

In Ct. a new trial is granted in this as readily as in any other case for one judgt. is a bar to another action between the same parties to the same title +

Recovery for mesne profits

× The verdict in Ejectment when in Pltff favor having established his title it follows that from the time of the ouster Deft. has been a trespasser 2 Ba 181 Esp. 494 3 Bl 205.

Often a recovery in Ejectment Pltff may have an action of trespass against Deft. to recover damages for the tortious unjust possn. This is called trespass for mesne profits & the damages recovered are in equity the value of the use of the land during Deftn. possn. - it may be laid with a continuando or the ouster & whole case may be stated specially. 3 Wils 121 Sel 638 Cro J 182 Esp 494 3 Bl 205 2 Ba 181 2 Burr 368 Sc R 977 Ried Cft. 302

This action is incident to a recovery in Ejectment. 3 Wils 121.

Said that Pltff may if he so elects bring a bill in Chancy. for an account of the profits - but this is not usual - obsolete - per on principle. for where an Sufr. may charge a trespasser on his land as bailiff &c it is said one of his own right cannot. 2 Ba 181 1 Dem 105

The necessity of this second action arises from the circumstance that in Ejectment the damages are nominal. 3 Bl 205 2 Wils 119 Cuts.

But it has been held that Pltff. may recover his actual damage in Ejectment - & accordingly full damages were recovered. 2 Ba 181 2 Burr 59 Carter 205.

Ejectment

Said & contra that the whole damages cannot be recovered in Ejectment because the action is not laid with a continuando / 2 Bac 181 Sm LC if by laying it with a continuando Pltff might recover the whole damages he would be obliged to prove an actual entry Cente Bac Abr.

In Ex. there is no doubt but that according to our practice full damages may be recovered in Ejectment. therefore allowing the second action seems impolitic - but it is established. - tho sometimes full damages are recovered here in Ejectment.

In this second action it is not necessary for Pltff to prove the entry of Deft. - for the recovery in Ejectment is conclusive evidence of that fact 2 Bac 181 Shewin 1124 Bullock 222.

Pltff however is not confined to the time of the lease & entry as laid in the declaration in Ejectment - he may recover antecedent profits if he can prove antecedent title & antecedent profits by Deft. Ep 494 2 Bl 1205 Bull 87 contra 2 Bac 181 & pro -

Distinction - If he sues only for the profits accrued since the lease laid in the declaration in Ejectment the record in that action is conclusive in his favor - but if he goes for antecedent profits Deft. may go to them contend his title for the record does not prove it. 2 Bl 1205 Ep 494 2 Bac 181 Bull 86

In the former case proof of the judgt in Ejectment & of the exn of the writ of posn is sufficient - i.e. sufficient proof of his right to recover for the profits accrued since the demise. 2 Bl 1205 Ep 494

In a second ejectment the first record is no evidence for it

If during the pendency of Ejectm. dft. gives up possn. to another that other is liable for mesne profits 13 Johns 449 pile 4 Cowen 329 8 Wend 594 11 Co 51 11 Johns 337

Pff is entitled to the mesne profits from the time of the demise laid in the declaran. 18 Johns R 281

A tenant having paid rent to A. was ejected at the suit of a third person who afterwards recovered from him the mesne profits for the period during which he had paid rent to A. held that tenant might recover back from A. the sums then paid in assumpsit - the title not coming in question as it had been settled in the action of Ejectment 21 C L 63. viz Cunningham vs Lamont. Barnett. Loups 414 - Assumpsit will not lie the title not being settled

In an action for mesne profits Pff may recover the expenses of bringing a writ of error to reverse a judgt in favor of Deft in the action of Ejectmt. for these are a part of the damages which he has sustained by reason of being kept out of poss.n ~~H.L.~~ 14 C L. 61.

To argument against a freeholder ejector the first record is no evidence for it

is res inter alios acta - Pff must prove his title. Esp. 494 Ibid 239. for Pff having gained posn. that posn. is said to have relation to the time of the title commencing which gives him a right to maintain trespass for the intervening profits. Esp. 494 2 Barnes 317. 1 Roll. Cases.

This action is within the service of the St. Limn. as to trespass - Deft. may therefore protect himself as to all mesne profits which have accrued within years in Eng & 3 in Ct. Esp. 495 1 Burr 188 4 Ct 273. 3 Ts 205 Chan.

Suppose Pff. in Ct goes for full damages in Ejectment Can Deft. avail himself of the St. as to the amount of damages?

In Eng. Ct the action may be brot in the name of the nominal Pff. or Defdt. if the nominal Pff releases the action he is guilty of a contempt Esp 495 Burr 665 3 Ts 205 1 Burr 189 2 Bu 182 Del 281 Thim. 247. yet will not the Court permit Deft. to plead it? Semb. it would.

Who in common owes one tenant in common cannot maintain trespass against his companion yet after a recovery in Ejectment he may have this action it being incident to the former. Esp 495 3 Wils 118 Sill. 323.

In an action charging voluntary waste only Pltff cannot recover on proof of permissive waste
34 E L 153. 1 Saund 323 b n 7 2 Co 252 a

It is no waste to remove utensils of trade or mantle chimney.
The fixed to the freehold, 1 Sh. 1 Bla 2 Saund 299 d n 11

Waste

Waste is any spoil or destruction in houses lands trees or other corporeal hereditaments, to the disherison of him of him who has the remainder or reversion in fee simple or fee tail 2 Bl 281 1 Inst 53 5 Bac 453 3 Bl 223

There seems to have been formerly a distinction between waste and disturbance - not attended to now. 1 Inst 53 5 Com 677 1 Reeve 38

Two kinds voluntary & permissive - voluntary is that which is occasioned by positive acts of spoil or destruction - an act of commission - Permissive is that which happens thro' negligence - an act of omission - 2 Bl. 281 5 Com 677 5 Bac 457 1 Inst. 53

Cont. by lessee not to do any waste is broken by permissive waste - Inst. - that if lessee does any waste lessor may enter - Mere failure permanent of repair - not enough that lessor might enter. 5 Bac 457 Cy. 281 2 Inst 145.

Whatever works or building injury to the inheritance is waste 2 Bl 281 5 Bac 457 2 Co 81

In Houses

Demolishing or burning a house is voluntary waste 5 Bac 461 1 Inst. 53 Com Waste D. 2.

So also removing boards tiles or any thing affixed to the freehold of the house - or removal of any thing affixed to the freehold by the tenant himself is voluntary waste - by waste is not to be for it is a wound of the building. 2 Bl 281 4 Co 64 5 Bac 464 2 Ro Ab 815 1 Inst. 53 Co Lit 329 74 2 Bulst. 713. 5 Com 677

Tho in gent. nothing is waste except what works an injury to the freehold yet changing the intended use of a building by lessee is waste even tho advantageous to lessor. 5 Bac 457 Co 1 82 2 Roll 814 1 Bac 309 1 Mod 94 2 Ld 282 Comb. 32.

Suffering a house to decay for want of necessary repairs is permissive waste in the tenant — for he is bound at his peril to keep the house from wasting unless exempted by contract. 1 Inst 53 5 Bac 461 5 Comb 32.

Lessee is liable in the last case tho there was no timber on the land demised it is at his peril. Secus if lessor at the lease not all the timber on the land since the demise. 1 Inst 53 4 Bac 461 2 Ld 461 2 Roll 822 Mod 7 Comb 32.

Building a new house on the land where there was none before is not waste. Bend. 1 5 Ba 461. But lessee must not take lessor's timber or other materials to build in a new city with — it must be at his own charge 2 Roll 815 Hob 234 1 Inst 53.

But if lessee having built a new house put out and suffer it to decay he is guilty of waste — for it has become a part of the freehold. Hob 234 1 Inst 53 Comb 32.

If lessor builds a new house after the demise lessee is not bound to repair — hence not liable in waste for its decay — for it was no part of the thing demised. Hob 234.

If a house leased was uncovered at the time of the lease made or commencement of it its decay for want of covering is not waste in the tenant. 1 Inst 53 Co 93 5 Ba 461 Comb 32

C. The burning a house tho negligence or accident was

Once questionable whether building a new house was not waste 4 Leon. 241 2 Dyer 211 b. n. Litt. R 264 Mutt. 102 2 Roll. 815. Keil. 88 Hob 234 Jenn. now if done without materially damaging the premises 3 Paige 262

[illegible] 1 Mod 334 1 Mod 53 2 Mod 4 Dy 4 Mod 101 2 Roll 814

* It is wrote that the estate is generally benefited by the conversion 1 Eq 309 311 2 Mod 94 2 Saund 259 n 11

a C. 1 the burning a house thro negligence or accident was

In Lands

waste in the tenant – he is now excused in Eng^d in case of accidental burning by b Com. 5 Ba 462 2 B. 281 – no such R. in Ec.

The destruction of a house by the act of God or public enemies is not waste in the tenant / 5 Ba 464 4 Bnt 503 1 Bnt 53 Com. D 25 / But if the house be left standing the tenant must repair it in a convenient or reasonable time – Semble if he suffer further lasting ~~waste~~ injury he is guilty of waste. 5 Ba 464 1 Ro 62 1 Bnt 53 10 Co 137 Com. D 25.

If the tenant suffers or commits waste yet if he repairs before action brot no recovery can be had against him – but he must plead the subject repairs specially – He may take the lopp's timber to repair after actually suffering waste – 1 Bnt 53 5 Ba 462

In Sands.

Digging up & carrying away the soil by the tenant is waste – he suffering a wall to be ruinous in consequence of which the land is injured by an influx of water / Com. Di D 4 2 Roll 816 5 Ba 458 1 Bnt 53 5 Com. 678 1 Ro 62 73 – / Semble if the wall be suddenly carried away by a torrent or tempest – tho' the tenant does not repair in a convenient time & further lasting injury ensue he is guilty of waste. 5 Ba 458 1 Bnt. 53 Com. D 25

Bad husbandry is not waste – but if tenant suffers a stable land thro' negligence to be overgrown with thorns – 3 Ba 458 2 Roll 814

But generally the converting one species of land to another is waste & beneficial to woodland the Decisions – for it changes not only the course of husbandry but the evidence of the identity of the estate – / Hob 334 1 Bnt 53 Com. D 4 Pelle 101 2 Roll 814

The custom in Ch. is (and) for the tenant to change arable into meadow land & be conscientious at pleasure - & perhaps no change here would be deemed waste unless actually & strongly injurious.

If tenant for life &c. shall open mines on the land he is guilty of waste - semble if the mines therunder were demised. 1 Inst 53 5 Co 12 2 Ch Ca 193 2 Vs 282 4 Co. 234 5 Ba 450 Com Dig

But digging mines found at the time of the demise is no waste the tenant does not mention them. Com. Dig 2 Vs 282 1 Inst 53 5 Co 12 5 Ba 451.

In Trees

If tenant for life or cuts down timber trees, except in special cases he is guilty of waste - to fire the day and pick in consequence which the timber decays - or to spring them &c - 2 Vs 281 4 Co 62 5 Ba 459 1 Inst 53 Com Dig 5 5 Ba 459 2 Ch Ca 215 -

By timber trees are meant all timber trees fit to be meddled with so that all trees are not timber trees - the cutting down dead trees near the house (the not timber trees) is waste. 1 Ch Ca 149 2 Vs 281 5 Ba 459 1 Inst 53 Com Dig.

Cesty the particular kind of trees which all within this demise &c. 2 Vs 281 Cy 65 1 Inst 53 2 Ch Ca 817 5 Ba 459 Ated 842 Cro E 571 Com Dig.

The tenant may cut timber at pleasure if it be at the proper season. 2 Vs 281 2 Ch Ca 258 817 8 Ph 146 -

Felling timber, particular agreement the tenant & common

Philip [illegible] particular against the [illegible] of common

right is entitled to such wood growing on the land as is necessary for fuel - for repairing houses or fences - or for repairing implements of husbandry - cutting this is not waste. 2 Bl 35 282 1 Brit. 41 3 Bra 460 H. & B. 57 Cro E 404

But if he suffer the house to become ruinous for want of repairs he cannot take repairs timber to repair it - this is waste. 3 Bra 460 1 Brit 53 -

He is guilty of waste if he cut timber to make houses &c. where there were none before - So if he cuts for repairs which are not necessary or the want of which were occasioned by improvidence. 2 Roll 822 1 Brit 53 Com to D 5.

Tenant is entitled to sufficient timber for repairs tho he has covenanted to repair at his own expence - for this right cannot be taken away except by express covt. - In many cases tenant may cut timber for repairs tho not compellable to repair - as where he has covenanted to repair - for the same serves the purpose of building &c - So tho the house be without impeachment of waste or the house be ruinous when the tenant enters - in which case he is not liable for waste to decay. Com. to D 5. 1 Brit 54 2 Roll 823 b 43

Destroying fruit trees in a garden or orchard is waste - tho' they grow upon other grounds - 3 Bra 461 1 Brit. 53 2 Roll 817 Com to D 5

Tait in Ex. that tenant in dower of wife lands who has cut timber for sale &c. was not guilty of waste - But the L.C. as a court of Chancy. will prevent such irremediable waste in such cases by an injunction.

Breaking down common fences is not in itself waste, but the its consequences may be. But destroying the fence of a pasture or suffering it to decay so that the cleave of is waste. 5 Co 481 Co Litt 53 2 Inst. 304 2 Leon 222 4 Bl R 240.

Tenant is not liable for waste unless the value amount to 40 pence sterling - for de minimis non curat lex. Noy 4 1 Inst 54 2 Bl 228 Co Litt. E. 1.

No person can be guilty of waste unless the place in which he is part of the demise holden by tenant for life or years. By Lease of a farm except a piece of wood - tenant cuts the wood - not waste Dy 19 Cro E 690 Co Litt E 2

But if there is merely a proviso that lessor may cut the wood Lessee is guilty of waste if he cuts it - for it is a cont. not an exception to the subject leased. Dy 19 Cro E 690 Co Litt E 2

If tenant of prigs excepting the wood be & the assignee cuts them he is guilty of waste - for as to Lessor it is a part of the demise & the exception is void for the Lessee has no such interest in the trees as to support the exception. 5 Co 75 81 2 Inst 302 Cro E 17 183 1 Leo 49 Co Litt. E 2 2 Roll 54

If a lease is made with the demise without impeachment of waste & the tenant is not liable for waste. Co Litt E 2 Mo 32 2 Inst 146 2 Roll 835 Cro J 210 2 Bl 283.

But this exception can be created by deed only & to constitute a waste section of waste it must be by the Lease which contains the lease - Litt. it is a cont. only. Mo 183 Co Litt. E 2 2 Inst. 146

Who may maintain Waste

If tenant in tail leases "without impeachment of waste" the clause does not bind his issue tho the latter confirms the lease by accepting rent. 1 Roll 183 Com to E 3.

The tenant is not guilty of waste if the injury be occasioned either directly or indirectly by Lessor. & Lessor destroys a fence in consequence of which the trees are destroyed. Com to E 4 2 Roll 822 5 Mod 9.

So if the injury was occasioned by the act of God or by public enemies - tho in this case he must repair in a convenient time if the subject matter remains & is capable of repair. 2 Saut 303 Ro 53 10 Co 39 Com to E 5

Who may maintain this action

The ancient writ of prohibition to stay waste is taken away by 3 W. 3 - Waste being to the disinherison of the party injured - he must bring the action who has the immediate reversion or remainder in fee simple or fee tail. 1 Bos 105 20 Barst 53 285 3 Bl 227 3 Bac 268 2 Roll 825 Hutt 110 2 Saut 302 Com to E 2

The reversion or remainder in Pl must be immediate - i.e. there must be no intermediate freehold between - if there is the reversion &c. in fee &c. cannot maintain the action - for if he could the remedy would destroy the intermediate estate. E 4 Lease to B for life rem. to C for life rem. to A in fee - if A could recover against C during the life of B. A only for the forfeiture would divest B's rem. it being a freehold. 5 Bac 268 1 Barst 34 2 Co 301 Com to E 3 5 Co 77 2 Bl 167 1 Bon. 58 Mo 18 2 Roll 829 Bro 1 688.

But if the intermediate remt to C in the last case were for years generally B might maintain the action against C during Cs life - for C. remt being a chattel interest does not require the continuance of the particular estate to support it but may take effect after Bs entry after the death of A. 2 Bl 1165 2 Inst 301 Com to 83.

If after the commencement of the estate for life the reversion grants the reversn for years to another - this is not a remn & the reversion can have no action for waste during the continuance of the second term. 1 Inst 54 5 Ba 167 Com to 83.

If an intermediate remt for life is limited on contingency & the tenant commit waste before the contingency happens the reversion in fee may maintain the action - for here the reversn does not divest the remn but prevents it from vesting - So if a lease for life is made to A remn to C for the life of B the reversioner may have the action during the first limitation for little estates are in A - Co Lit 82 Com to 82 2 Inst 301 Sand 1 Ro 1 458

Suppose if A have the immediate inheritance at the time of action brot tho he had it not at the time of waste committed by A. Lease to A for life & remn to B for life - A commits waste - reversion B dies or surrenders remainder may have the action against A. 1 Inst 54 2 Ro Ab 829 Ro 384 5 Co 70 Co Lit 82 Sand 1 Com to 132.

If tenant in common in fee demises his part to his co-tenant for life or years he may have the action & recover a moiety of the land & damages - So if A & B are 2 on tenant in common

Plaintiff's damages - 00 (illegible) 11 (illegible) 2 one tenant in common